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No. 258

In the Supreme Court of the United States

OCTOBER TERM, 1948

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE PITTSBURGH STEAMSHIP COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the Court of Appeals (R. 867-872) is reported in 167 F. 2d 126. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 854-857) are reported in 69 N. L. R. B. 1395.

JURISDICTION

The judgment of the Court of Appeals was entered on April 5, 1948 (R. 867). The Board's petition for rehearing (R. 873-902) was denied on June 4, 1948 (R. 903). The petition for a writ of certiorari was granted on November 8, 1948.

The jurisdiction of this Court is invoked under Section 1254 of 28 U. S. C., as codified June 25, 1948, and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether a trial examiner, by crediting the witnesses called by the Board and discrediting the witnesses called by the employer on those matters as to which there was a conflict of testimony, manifests such bias and prejudice as to warrant a court in setting aside an order of the Board based upon findings of the Trial Examiner which were adopted by the Board, without the court determining that there is no substantial evidence to support the findings.

2. Whether the record in this case discloses that the Trial Examiner had any bias or prejudice against the Company or in favor of the charging union.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 106-111.

STATEMENT

I

THE PROCEEDINGS BEFORE THE BOARD

Upon an amended charge duly filed by the National Maritime Union, C. I. O., hereinafter

called the Union (R. 1-2), the Board, on July 10, 1945, issued its complaint alleging that The Pittsburgh Steamship Company, hereinafter called the Company, had engaged in certain conduct violative of Section 8 (1) and (3) of the National Labor Relations Act (R. 4-6). The Company, in its answer, denied the material allegations in the complaint (R. 6-7). Hearings were thereafter held before a trial examiner of the Board on July 26-28, 1945, August 28 to September 5, 1945, and October 2, 1945 (R. 800). At the hearings most of the issues were sharply contested, and considerable testimony was offered by both sides.

On December 28, 1945, the Trial Examiner issued his intermediate report (R. 799-843), finding that the Company, by the statements and actions of its officers and supervisory personnel, interfered with, restrained and coerced its employees in violation of Section 8 (1) of the Act, and discriminatorily discharged Howard Shartle in violation of Section 8 (3) of the Act (R. 823-839).

Exceptions were thereafter filed by the Company (R. 846-852), briefs were submitted (R. 855), and oral argument heard by the Board (R. 855). After reviewing and considering the entire record in the case, the intermediate report, the exceptions, briefs and argument (R. 855), the Board issued its decision and order

on August 13, 1946 (R. 854-857), wherein it adopted the findings, conclusions and recommendations of the Trial Examiner, with certain corrections and additions (R. 855).

II

THE BOARD'S FINDINGS OF FACT

The court below stated in its decision that the Trial Examiner had credited the witnesses for the Board and discredited the Company's witnesses whenever there was a conflict in their testimony (R. 871). In points II and III of the Argument we analyze the Trial Examiner's rulings and the conflicting evidence which demonstrate that the Trial Examiner's decisions on credibility were neither one-sided nor unfair. The following summary of the facts as found by the Board and as reported in the Board's decision (R. 854-855) and in the Trial Examiner's intermediate report (R. 801-839) shows the nature of the case and the more than substantial evidence supporting the findings.

A. THE COMPANY'S INTERFERENCE, RESTRAINT AND COERCION IN VIOLATION OF SECTION 8 (1) OF THE ACT

Prior to and during the March to November 1944 sailing season for the Company's freighters on the Great Lakes, the Union made an intensive drive to organize the Company's unlicensed personnel (R. 801-802; 13, 47, 124-125, 277, 533,

697).¹ To this end the Union designated a crew member on each of the Company's approximately seventy freighters to act as a volunteer organizer (R. 807; 13, 39, 140, 252, 533, 664). On November 8, 1943, it petitioned the Board to conduct an election to determine whether the unlicensed personnel desired the Union to represent them (R. 802; 274, 697, 760).

During the Union's organizational drive, and particularly prior to the election held by the Board in June 1944 (R. 802; 26-27, 127, 273-274, 761),² the Company, as the Board found, engaged in a course of conduct designed to "defeat the Union in the election, and, beyond that, to discourage and frustrate the organizational efforts of the Union" (R. 823-824). The Company's offensive against the Union was carried on by its licensed personnel, supervisory employees with authority to hire and discharge or effectively to recommend the discharge of the unlicensed personnel (R. 801-802; 13, 54, 85-86, 171, 213, 258, 261, 272, 275-276, 556-557).³

¹ Wherever in a series of references semicolons appear, the references preceding the semicolons are to the Board's findings; those which follow are to the supporting evidence.

² The Union failed to receive a majority of the votes cast (R. 802; 27, 274, 761).

³ The licensed personnel on each vessel consisted of the captain or master, of the vessel, the chief engineer, three mates rated as "first," "second," and "third," and three assistant engineers who were similarly rated (R. 801; 13, 224-225).

1. *The discriminatory and abusive treatment of union leaders*

Upon learning the identity of the organizers and other union members, the Company, on a number of the vessels, imposed restrictions upon their freedom of speech and movements which had never before been imposed upon any of the employees. It had been customary for members of the crew to talk freely to each other about any subject while at work as well as on their free time, and the Company had no rule forbidding such practice (R. 820; 318, 403). However, on the *Filbert*, ship organizer Lee was admonished by Captain Brinker not to continue asking employees to join the Union after they had once told him "no" (R. 808, 825; 418).

On the *Morse*, shortly after Captain Gerlach learned that employee Weissflog was the ship's organizer, he approached Weissflog and warned him, "I know what you are here for. I will warn you * * * that while you are on watch and any of the other men are on watch, don't talk to them. When you are off watch and the other men are off watch you can do as you please" (R. 820; 308, 317-318, 604). Thereafter, upon finding Weissflog, during his regular lunch period, talking about the Union to other crew members in the messroom, which was used as a recreation place as well as a lunchroom, Captain Gerlach grabbed him and forcibly ejected him from the room stating that he did not want again to

find Weissflog talking to crew members (R. 821; 60-62, 77, 324-325, 702-706). On another occasion when Captain Gerlach observed Weissflog talking to crew members in the firemen's quarters during his free time, Gerlach again physically ejected him from the room, stating that Weissflog had no reason to speak to the firemen, that he was going to stop Weissflog from speaking to anyone and that Weissflog "ought to go back to the salt water where [he] belonged" (R. 821; 62, 78, 329-330, 604).. /

On still another occasion when ten crew members, including ship organizer Weissflog, were late in returning to the ship from shore leave where they had been to the union hall, Captain Gerlach selected Weissflog alone for reprimand, stating in the presence of the other crew members that he was interested only in Weissflog because Weissflog was the organizer (R. 820-821; 58-59, 309). In addition to thus abusing the ship's organizer, Captain Gerlach attempted further unlawfully to discourage membership in the Union by urging deck hand Zmrzek to keep away from Weissflog, not to listen to him, and not to vote for the Union, warning him that even if the Union won the election it would be unable to obtain a contract with the Company for three or four years (R. 819; 42-43).

On the steamer *Widener*, Captain Lehne similarly sought to restrict the solicitation activities

of Deck Watchman Babin, who had been designated as the ship's organizer (R. 816; 13). Early in April, the captain summoned Babin to an interview in his room (R. 816; 14). He opened the interview with the statement, "I understand you are an organizer aboard this ship." He then asserted that "The company does not hire union men aboard any of their ships" and accused Babin of talking unionism to the men and interfering with their work (R. 816; 14). Upon two subsequent occasions Captain Lehne again summoned Babin to his room and reprimanded him for interfering with the work of the crew by talking unionism to them day and night (R. 816; 14-15). Upon these occasions Babin, as the Board found, had not in fact spoken of the Union to the men while they were at work (R. 816-817; 14-15, 39-40), but rather Captain Lehne's accusations were attempts to curb legitimate union activities and prevent the successful organization of crew members on the steamer *Widener* (R. 818).

Chief Engineer Hunger sought to isolate Babin from the other members of the crew and limit strictly his opportunities to proselytize for the Union. On one occasion prior to the election when Babin was performing his duties of marking the soundings on a board in the engine room and conveying instructions from the mate in regard to water to be turned on or shut off, the chief engineer, in vile language, ordered him to

keep out of the engine room and to cease "talking Union" to the engine room employees either in their quarters or in the engine room (R. 817; 17-18, 32-35). Up to that time it had been customary for deck watchmen to converse with the engine crew while engaged in their sounding tasks in the engine room, and the Company had no rule prohibiting employees from talking while on watch (R. 818; 17-18, 318, 403).

Union adherents were also subjected to other forms of discriminatory and abusive treatment. In addition to isolating ship organizer Babin as above described, the ship's officers, on a number of occasions prior to the election, in the presence of deck hands who worked under Babin, subjected him, because of his union activities, to unnecessary and unwarranted abuse and criticism. For example, on one occasion in April 1944, while Babin was engaged in securing the anchor claws, the first mate shoved him aside with the remark that "All you G— d— union men don't know how to do anything" (R. 818; 15). On another occasion shortly thereafter, the first mate came alongside him as he and another deck hand were engaged in their work of spreading a tarp, pulled the tarp out of his hands, pushed him over, and, in vulgar language, ordered him away (R. 818; 16). On still another occasion while Babin and the three deck hands under him were engaged in rescrubbing the cabin which the first watch had

not scrubbed to the satisfaction of the captain, the first mate approached them and after criticizing their progress, stated, "If that is the way you G— d— union men are going to do this work, you might as well pile off" (R. 818; 16-17).

2. Interrogation of employees regarding their union membership.

A number of the Company's representatives questioned employees concerning the union membership and activities of themselves and fellow employees. On the steamer *Johnson*, Captain Wallace, about April 15, 1944, as a prelude to an attack upon the Union's policies, interrogated Wheelsman George Anderson in regard to his union membership (R. 812; 249-250). In May 1944, he asked Anderson whether there were any union members on the forward part of the ship, adding that he knew that the men were all union members in the aft part of the ship (R. 812; 251). In the same month he asked Anderson whether he "was an organizer or just a good union man" (R. 812; 252). Finally, in June 1944, after the ship left Two Harbors where Anderson had visited the union hall, the Captain asked him whether Watchman Bean and Wheelsman Carter (R. 812-813; 253-254), both of whom had been to the union hall, were members of the Union (*ibid.*). When Anderson told the Captain to inquire of the men themselves, the Captain remarked, "They were up to the union hall yes-

terday, weren't they? They must belong to the Union" (*ibid.*). Captain Wallace, as the Board found (R. 813), thereby conveyed the impression that the Company was engaged in surveillance of the union hall.

Similarly, on the steamer *McGonagle*, Captain Penzenhagen asked one of the employees who was going ashore whether he was bound for the union hall (R. 813; 225); on the steamer *Bunson*, Captain Lawless asked ship organizer Vogt, in the presence of the crew, whether he belonged to the Union (R. 814; 84); and on the steamer *Morse*, Captain Gerlach inquired of one of the employees under him concerning the identity of the ship organizer aboard that vessel (R. 819; 44).

3. Threats and attempts to discharge union leaders

Other representatives of the Company threatened to discharge or attempted unsuccessfully to discharge union leaders. Thus, Chief Engineer Curry on board the *Filbert*, impressed upon ship organizer Lee the precarious nature of his position by telling him that John Zyp, assistant to the fleet captain, who was detailed to the personnel office (R. 810; 669, 670), had attempted to bring about Lee's discharge but that he, Curry, had saved Lee's job by advising the ship's captain, Brinker, that he would resign if Lee were discharged (R. 810-811; 134-135). Captain Brinker did not discharge Lee, but as stated, *supra*, p. 6,

attempted to restrict him in his organizational activities.

On board the *Johnson*, Captain Wallace similarly sought to intimidate the ship's organizer, Sims. After berating the Union and telling Sims that he did not want "any part" of the Union on his ship, Captain Wallace stated with reference to employee Anderson, who was then on shore leave: "Now this old Anderson on here, he is a great Union man. If he comes back drunk, if I catch him with drink on him, well, the first chance I get I am going to fire him" (R. 811; 280). When Sims protested that Anderson was a good wheelsman, Captain Wallace replied "Yes, he can wheel a steamboat, sure he can, but the first chance I get I am going to fire him" (*ibid.*).

On board the *Olds*, the Company not only discharged one ship organizer, Shartle, because of his union membership and activities (see *infra*, pp. 13-22), but attempted to discharge Shartle's successor, Vogel for the same reason. In June 1944, First Mate Dobson, upon overhearing Vogel arguing with a drunken deck hand about an accounting of union dues, turned to Vogel and stated: "So you are the union organizer. * * * That's where all this trouble is coming from. * * * You can pack up your clothes and get off." (R. 823; 215-216, 218.) Vogel protested that the ship was sailing within an hour and that he would

not have time to pack his clothes and leave the ship before it sailed (R. 823; 216, 223). Thereupon, First Mate Dobson agreed that Vogel leave at the end of the trip (*ibid.*). At the termination of the trip, after Vogel had packed his clothes and was about to leave, the mate relented and expressed a willingness for Vogel to remain. Vogel, considering his future status on the ship insecure, left anyway. (R. 823; 216, 224.)

**B. THE DISCRIMINATORY DISCHARGE OF SHARTLE IN VIOLATION OF
SECTION 8 (3) AND (10) OF THE ACT**

Howard Shartle was hired on March 31, 1944, as a seaman on the steamer *Olds* (R. 830; 168, 170). He had received his A. B. certificate, which classified him as a certified able-bodied seaman, in July of the preceding year after three months' training at a government operated shore training school, three months' service as an apprentice seaman on Great Lakes vessels, and the successful completion of a United States Coast Guard qualifying examination (R. 830; 170, 177, 182-183). This experience, coupled with several months sailing thereafter on ocean vessels, represented the full sum of his experience at the date he was hired by the Company (R. 830; 169). The Company knew of Shartle's limited experience at the time it hired him (R. 830; 169, 674, 681). It was, nevertheless, glad to obtain his services, for at that time the war was still in

progress and there was a serious shortage of A. B. seamen available (R. 833; 520, 668-669, 671-672). Even after Shartle was hired the ship was still being operated with one less A. B. seaman than was required by the governing maritime regulations (R. 833; 177, 339, 507, 520).

Shartle had joined the Union prior to his employment by the Company and was designated by the Union as its organizer on board the *Olds* (R. 830; 170). Upon joining the crew of the *Olds*, he openly and actively engaged in organizational work among members of the unlicensed personnel (R. 830-831; 170-171, 179, 209). He also distributed copies of the Union's publication, the *Pilot*, among the crew members, including the immediate supervisors, the second and third mates, and to some of the other licensed personnel (R. 831; 170-171, 179, 209). Thus, the Company knew of Shartle's position as the ship's organizer (R. 832). The Board noted that even in the absence of such direct proof of knowledge, the conclusion that the Company knew of Shartle's activities would have been warranted from the fact, that on a small ship such as the *Olds* where men live, eat, and work together for twenty-four hours a day, news of any interest, including news of organizational activities, spreads rapidly among the licensed, as well as the unlicensed, personnel (R. 831-832; 317).

On April 24, 1944, First Mate Dobson discharged Shartle without prior warning for the

alleged reason that he was "incompetent" (R. 832-833; 172, 174-176, 502). Shartle was replaced by an ordinary deck hand, no A. B. seaman being available (R. 833; 337, 502-503, 676-677). After Shartle's discharge, John Vogel, also a watchman on the *Olds*, was designated by the Union to succeed Shartle as the ship's organizer (R. 823; 213, 218). As has already been described (*supra*, pp. 12-13), when First Mate Dobson discovered about June 19, that Vogel had been designated as the ship's organizer, he attempted to discharge Vogel. Only the fact that Vogel would have had insufficient time to pack his clothes and leave the ship before the scheduled sailing time saved his job for that trip (*supra*, pp. 12-13).

The Company contended at the hearing that Shartle was discharged for incompetency consisting of (1) lateness in reporting for work; (2) inability to wheel a boat properly; (3) failure to do his share of painting work during the fit-out period and an attempted interference with the painting work of others; (4) inability to handle the winches properly; (5) inability to supervise the deck hands under him; and (6) inability to splice a cringle (R. 833; 732).

The evidence disclosed that Shartle had been late in reporting for duty only once, and that upon that occasion, the day after he was hired, he was detained by the Company's physician to whom he had reported for a physical check-up pursuant to the Company's instructions (R. 833,

n. 38; 192-193). The Company did not thereafter, in its brief to the Board, urge lateness as one of the reasons for Shartle's discharge, and the Board regarded the Company's contention in this respect as having no weight and as having been abandoned (R. 833, n. 38). Similarly, the Board gave no weight to the testimony that Shartle's lack of proficiency in wheeling the ship contributed to its decision to discharge him, since the record shows that wheeling a ship is not one of the duties of a watchman, the job for which Shartle was hired (R. 834; 184, 185, 540).

The Board found that the other reasons assigned were likewise not the true reasons for Shartle's discharge (R. 838). The charge that Shartle failed to do more than one-half his share of painting during the fit-out period, and that upon one occasion he "razzed" fellow employees for painting more rapidly than he, was denied by Shartle (R. 834; 192, 193, 334-335, 513-514, 525). His painting partner, Vogel, never complained of having to do more than his share of the teamwork and Shartle was never criticized or reprimanded for any shortcoming in this respect (R. 834; 176, 192, 216, 220-221, 349-350). The Board, under the circumstances, found that the testimony offered by the Company in support of its charge against Shartle was "greatly exaggerated and unreliable," and concluded that, in any event, the Company condoned any deficiency which Shartle

may have displayed at the task of painting when it permitted him to sail following the fit-out period (R. 834-835).

The Company's claim that Shartle was unable properly to operate the ship's winches was based upon a single incident of claimed negligence on Shartle's part occurring about two weeks before his discharge (R. 835; 500, 536-537). On that occasion, Shartle and the deck hand assisting him, had failed to place the control lever in the proper position, which resulted in unduly tightening the cable wire which might have resulted in a parting of the wire had not Second Mate Chrobak noticed it and corrected the mistake (R. 835-836; 335-336, 524-525, 536). The *Olds*, unlike most vessels to which seamen are accustomed, was equipped with modern electric winches (R. 835, n. 42; 190, 534-535). New men aboard the vessel are not expected to know how to operate the winches; they are taught to do so by the mates; they work at first under the mates' close supervision and gradually are allowed greater responsibility (R. 835, n. 42; 336, 534-535). Shartle was not even reprimanded because of the incident and he continued thereafter as before to operate the winches under some supervision (R. 836, n. 43; 533-534). First Mate Dobson conceded that although it was customary for him to report to the ship's captain serious cases of negligence on the part

of employees, he did not inform the captain of Shartle's negligence (R. 515). Other seamen had committed this same error aboard other vessels of the Company but had not been discharged therefor (R. 836; 344-345).

The Company next contended that Shartle lacked leadership qualities and that this deficiency contributed to its decision to discharge him (R. 835; 520-522, 525). The Company could cite no specific occasion when Shartle had displayed a shortcoming in this respect, and the Board gave no weight or credit to the conclusionary testimony in this regard (R. 835).

The incident which, according to the Company, constituted the precipitant cause for Shartle's discharge was the discovery about three days before discharging him that he was unable properly to splice a cringle on a tow line, a difficult task with which A. B. seamen are expected to be familiar, but which they are seldom called upon to perform (R. 836; 219-220, 221, 222, 514-515). The necessity for performing this type of work arises only about once in six months, and although Shartle had on one occasion prior to his employment by the Company helped a mate perform a similar task, he had never had occasion to assume the responsibility for such a job prior to the occasion in question (R. 836-837; 193-195, 200, 338). On that occasion while Shartle and his deck hand were attempting to splice the

cringle, watchman Vogel, who was off duty at the time, offered to assist them (R. 836; 219, 222). Vogel had had twenty years of experience as a seaman and was thoroughly familiar with the proper way in which to splice (R. 836; 220). While Vogel was thus assisting Shartle and showing him how properly to perform the task, First Mate Dobson appeared upon the scene and, after commenting on the fact that Shartle did not know how to perform the job, ordered both Vogel and Shartle to discontinue the job (R. 836; 194, 209, 216, 220, 501). Instead of permitting Vogel to teach Shartle this difficult operation as Vogel had volunteered to do, and thereby helping Shartle to become a skilled and experienced A. B. seaman, First Mate Dobson assigned the task to Vogel when he later came on watch (R. 836; 220, 222, 518). The Board found that First Mate Dobson's conduct in this regard (R. 838) demonstrated that Dobson was more concerned with building up a plausible excuse for ridding the *Olds* of the ship's organizer than with acquiring an experienced A. B. seaman. When the mate discharged Shartle three days later, there was no A. B. seaman available to replace him and it became necessary for Dobson to promote a deck hand to perform Shartle's job as watchman (R. 833; 178, 502-503, 507-508). Second Mate Chrobak, who was the immediate supervisor of the deck hand after his promotion, did not know whether the deck hand had ever had any experi-

ence at splicing because no occasion requiring splicing had arisen during the remainder of the season (R. 837; 337-338). Dobson admitted that during the preceding four years he had found A. B. seamen, other than Shartle, inexperienced at splicing and that he had not discharged them for that reason (R. 836; 514-515).

The Board noted that some of the incidents recited by the Company indicated that Shartle lacked the experience and skill possessed by old-line A. B. seamen; but since the Company knew when it hired him that Shartle was at the threshold of his career as an A. B. seaman, it must have expected to train him in some respects in which its older A. B.'s were already skilled (R. 837). Third Mate Hewer conceded that although A. B. seamen like Shartle, trained at government schools, were often found to be inexperienced and unskilled, they were not discharged on that account, but were given training and instructions among other things, in the handling of equipment, in leadership, and in painting, the very respects in which Shartle was claimed to have been deficient (R. 837-838; 537-538). The Company's industrial relations manager testified that due to the difficulties in obtaining experienced crew members the Company was willing to put up with more from its men than it ordinarily might, and was even taking on "one-eyed and one-legged men" (R. 837; 664,

669, 671, 672). The Board found that the Company's failure to instruct or train Shartle, except for the limited instructions regarding operation of the modern-type electric winches, indicated, "either that Shartle was not deficient * * * as claimed, or that [the Company] did not instruct Shartle because it desired to rid itself of him for reasons aside from the manner in which he performed his work" (R. 838).

First Mate Dobson, who discharged Shartle, manifested extreme antipathy for the Union and a determination to thwart all efforts of the Union to organize seamen on the *Olds* by ridding the ship of its organizers (R. 855, 838; 172, 215-216, 218). In making the discharge, First Mate Dobson acted on his own initiative without any recommendation from Shartle's immediate superiors, Second Mate Chrobak and Third Mate Hewer, although it was the duty of those supervisors to recommend the discharge of employees under them whom they found incompetent (R. 832-833; 344, 352, 504-505, 528, 677). As shown (*supra*, pp. 12-13), it was also First Mate Dobson who stated to employee Vogel upon discovering that the latter had succeeded Shartle as the ship's organizer, "So you are the union organizer. * * * You can just pack up your clothes and get off." In view of Dobson's anti-union animus, his unsatisfactory explanation for Shartle's discharge and his attempt to discharge Vogel be-

cause of his position as ship's organizer, the Board found that Shartle was dismissed "because of his connection with and activities on behalf of the Union, and not because [he] was an incompetent employee" (R. 855).

C. OTHER ANTI-UNION STATEMENTS OF THE COMPANY
CONSIDERED BY THE BOARD

In addition to the foregoing findings of interference, restraint, coercion and discrimination, *supra*, pp. 4-22, the Board and the Trial Examiner also considered other statements made by the Company and its supervisory personnel. Some of these statements the Trial Examiner held were not violative of the Act. Others, which were found by the Board and the Trial Examiner to constitute evidence of unfair labor practices, may now be privileged under Section 8 (c) of the amended Act, *infra*, pp. 110-111, and therefore the Company is not now precluded by the Board's order from repeating such statements if it so desires. However, in order to complete the picture of the evidence considered by the Board and the Trial Examiner, we are setting forth herein the evidence in question.

1. The "Ferber Letters"

In the period shortly preceding the election, when the Union's organizing campaign was at its height, A. H. Ferbert, the Company's president (R. 803; 736, 744, 746) addressed two letters to

each of the unlicensed personnel on the Company's ships (R. 803; 57, 743-746). These letters, although alleged to have been written for the purpose of acquainting the employees with the Company's neutral position, were found by the Board to have been designed to "convey the impression that collective bargaining would be fruitless" and that "the employees' selection of the Union would result in a forfeiture by the employees of their opportunities for promotion" (R. 806).

The first letter, dated May 2, 1944 (R. 805; 57, 743-744), stated "that neither the Union nor the Company has today control over what wages shall be paid. * * * wage rates * * * have been frozen by the Government * * *" (R. 805; 57, 743). Although the statement was not literally untrue, the impression it was designed to leave with the employees was that there could be no fruition to the Union's campaign promises that if designated as their bargaining representative it would obtain for the employees higher wage scales, increased overtime pay and other additional remuneration. The letter thereby implied that the employees did not need a bargaining representative, diverting their attention from the fact that increased wages are but one of many benefits obtained from collective bargaining. (R. 806; 108-122.) Actually the War Labor Board did permit upward wage adjustments for seamen

on the Great Lakes, a fact which the Company well knew (R. 806; 112), and the Company therefore misled its employees by the choice of language used in the first "Ferber letter" (R. 806; 110-112).

The second letter sent to all the employees by President Ferbert is dated June 1, 1944, less than one week before the commencement of the voting on the Company's ships (R. 804; 26, 57, 744-746). This letter pointed to the Union's "rotary hiring" policy and inaccurately stated that if that policy were adopted it would prevent the employees from freely changing ships and, what is more important, would preclude them from obtaining higher and better paying positions (R. 805-806; 57, 113-117, 745). The letter also called upon the employees to study the "past record of this Union and the past record of the Company" thereby indicating as the Board found, that the employees must choose between their allegiance toward the Company and their desire for a bargaining representative (R. 828; 57, 745).

The Board found that the "Ferber letters" because of the misstatements, half-truths and innuendoes contained in them, when considered in context of the other violative statements and acts of the Company, were not constitutionally protected (R. 855; 828-829).*

* In view of the setting of the letters in relation to the Company's other anti-union conduct, the Board properly did not regard the letters as constitutionally privileged. *National*

2. The "Jim Crow" pamphlet, the appeals to race prejudice, and other disparagement.

Shortly after the Union began its organizational campaign, there appeared upon the Company's ships numerous copies of a pamphlet entitled "N.M.U. Fights Jim Crow" (R. 803; 645, 762-771). Board witnesses admitted that the pamphlet had been prepared originally by the Union for use on the Coasts, but repeatedly denied that the Union was responsible for its distribution on the Great Lakes. (R. 803-804; 20-21, 54-56, 103, 234, 588, 612-613). Although there was testimony indicating that the pamphlet was distributed to the employees by the Company, the Company denied that it had done so, and the Trial Examiner found that the allegation that the Company was responsible for the distribution was not sufficiently supported by credible evidence to

Labor Relations Board v. Virginia Electric & Power Co., 314 U. S. 469, 476-480. Since the entire proceeding before the Board preceded passage of the 1947 amendment (Section 8 (c)) precluding the use of such statements as evidence, a prohibition much stricter than the constitutional privilege, the Board was not barred from treating the statements as evidence of unfair labor practices in this case. Cf. *National Labor Relations Board v. Bird Machine Co.*, 161 F. 2d 589, 590-591 (C. C. A. 1); *National Labor Relations Board v. Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 662 (C. C. A. 2). The Board's order, of course, rests largely upon the other evidence reviewed above, and the Board recognizes that at the present time an order of enforcement governing future action would not restrain conduct no longer violative of the Act.

warrant a finding against the Company (R. 804: 54-56, 421, 427, 588, 590, 612-613, 658).

However, the Company's supervisors immediately seized upon the pamphlet as an excuse for their attempts to alienate the employees against the Union, building upon it a concerted appeal to the anti-Negro feelings of many crew members. Thus, according to the credited testimony of seaman Lee, Captain Brinker of the *Filbert* characterized the Union as a "bunch of nigger loving bastards" and stated that if the Union won the election it would "load the ship with niggers" (R. 809: 132). Captain Brinker also told Lee, in the presence of other crew members, that if the Union won the election "I am going to hire a big nigger to be your partner and the blacker the better" (R. 809: 133).

First Assistant Engineer Anderson of the *Johnson* followed the same line, telling the employees who favored the Union "You and the CIO if you do win the election you are going to bring up a lot of goddam niggers from the Coast, and they are going to put one in every room. How would you like to eat and sleep with a nigger?" (R. 812: 282). These words were echoed by Captain Wallace who asked seaman Anderson (not related to the first assistant engineer) whether he "would like to sleep in a room with a nigger" (R. 813: 251). Second Assistant Engineer Benson of the *McGonagle* also inter-

persed his other anti-union statements with remarks that he did not like to sleep among "a bunch of niggers" (R. 813; 226-227), while Captain Lawless of the *Bunson* told seaman Vogt "If these lake boats are organized they will have a bunch of niggers down here and you will have to work with them" (R. 814; 85).

Captain Murray of the *Olds* told two of his seamen that "if the Union gets in here on the Lakes, you are going to be eating and sleeping with the niggers" (R. 822; 171), and told another employee, Vogel, that he would hate to give orders to Negro crewmen (R. 822; 215). On the same ship the chief engineer (whose name is not reported) told members of the crew that he was opposed to the Union because it sponsored a close working relationship between Negroes and white men (R. 822; 214).

The ships' officers did not limit themselves to the Negro issue as a basis for disparaging the Union and its organizers before the crew members. The Board found, upon the credited testimony of seaman Lee, that Captain Brinker had repeatedly stated, in profane language, that the principles of the Union members were "rotten," "they were lying bastards" and the Union itself was "no — good" (R. 809; 131). First Assistant Engineer Anderson told seaman Sims that it was foolish for the men to pay Union dues to support the Union's officers, whom he characterized as

"gas hounds" and "drunks"; and that "The CIO isn't going to last always, President Roosevelt isn't going to live always, and when he dies all the Jews, the God Damned Jews are going to be out and we will have a different set-up" (R. 812; 262, 281-282). Captain Lawless also told seaman Vogt that the N. M. U. and the C. I. O. were a "bunch of Communists and Jews" (R. 814; 84), and Third Mate Cary and Third Assistant Engineer Scharmin repeatedly advised the crew that the Union's officials were agitators and Communists (R. 815; 86-87).

The Board found the statements set forth above, *supra*, pp. 25-28, when considered in the context of all the other unfair labor practices perpetrated by the Company and its supervisory personnel, "constituted an integral part of the [Company's] broad pattern of coercive conduct" (R. 826-828).

III

THE BOARD'S CONCLUSIONS AND ORDER

The Board, after carefully reviewing the record and the intermediate report of the Trial Examiner, and after considering the exceptions, briefs and oral argument, concluded that the findings and conclusions of the Trial Examiner were free from serious error. The Board specifically agreed with the Trial Examiner as to the import of the "Ferber letters," finding that, although they were not unlawful *per se*, when considered in the context of the Company's other illegal acts

and statements they "assume[d] a coercive character which is not privileged by the right of free speech" (R. 855).⁵ Further, in finding that the discharge of Shartle was motivated by antiunion animus, the Board noted the fact that First Mate Dobson attempted to discharge Vogel upon learning that the latter had replaced Shartle as ship's organizer (R. 855)—a consideration to which the Trial Examiner had not adverted in his statement of his conclusions respecting Shartle's discharge. The Board also corrected an error in the intermediate report wherein the Trial Examiner had stated that Seaman Lee had not solicited Seaman McGuiness to join the Union (R. 808, n. 8), when in fact McGuiness had testified that Lee had asked him to do so (R. 855). With these corrections and additions it adopted the findings, conclusions and recommendations of the Trial Examiner without repeating them in its own decision. (R. 854-855).

The findings, summarized above, *supra*, pp. 4-28, were for the most part based upon testimony of Board witnesses which was either undenied, admitted, or substantially corroborated by the Company's own witnesses. Where findings were based upon a resolution of the credibility of contradictory witnesses, the Board, in accordance with its usual custom, relied upon the Trial Examiner's resolution of such conflicts in the evi-

⁵ See n. 4, pp. 24-25, *supra*.

dence, since he had observed the witnesses and heard their testimony, and since the Board found no basis for deciding that the determinations as to credibility were improper.

Upon the findings so made the Board concluded that the Company had engaged in a course of conduct designed to interfere with, restrain and coerce its employees in violation of Section 8 (1) of the Act (R. 823-830, 855), and had discriminatorily discharged Howard Shartle because of his activity as a Union organizer, in violation of Section 8 (3) and (1) of the Act (R. 838-839, 855). The Board therefore issued its order directing the Company to cease and desist from discouraging membership in the Union or any other labor organization, and from in any other manner interfering with, restraining or coercing its employees in the exercise of rights guaranteed them under Section 7 of the Act; to offer reinstatement to the discriminatorily discharged employee, Howard Shartle, and make him whole for any loss of wages; and to post the usual compliance notices on each of its ships (R. 856-857).

IV

THE PROCEEDINGS IN THE COURT OF APPEALS

The Company filed with the court below a petition to review the Board's decision and order (R. 860-861), and the Board answered and requested enforcement of its order (R. 862-866).

On April 5, 1948 the court below issued its decision and entered its judgment setting aside the Board's order (R. 867-872).

The court in its opinion (R. 867-872), discussed only two* of the grounds upon which the Company based its attack upon the validity of the Board's decision and order (R. 860-861). The Company had contended (1) that the Board had failed to comply with Section 10 (c) of the Act by adopting the findings of the Trial Examiner instead of making and stating its own independent findings (R. 860-861), and (2) that the Trial Examiner, by crediting all of the testimony of the Board's witnesses and refusing to credit any of the testimony of the Company's witnesses, had failed to make true and fair findings (R. 861).

The court below disagreed with the first point raised by the Company, and ruled that "adoption of a trial examiner's findings and conclusions does not necessarily mean that the Board has abdicated in favor of mental processes extrinsic to its own" (R. 869-870). The court, however, agreed with the Company that the Trial Examiner had credited all the Board's witnesses and that this established his bias and prejudice (R. 871). It

* The court also discussed, but did not decide, whether the Board properly found the "Ferber letters" to be part of the Company's anti-union conduct and therefore not constitutionally protected (R. 868-869).

held that since the Board had relied for its findings upon the Trial Examiner's determinations as to credibility, enforcement of the Board's order must be denied (R. 872). The court stated (R. 871-872):

Courts have recognized that it is contrary to human experience that all witnesses on one side of a case are falsifiers while those on the other side are all truthful, * * *. It is enough to say that the unvarying repudiation of every witness for the [Company] because of falsity, evasion or faint recollection, along with the consistent exaltation of every union witness as truthful, forthright and accurate, destroys completely any confidence that might otherwise be placed in the findings of the trial examiner and stamp them as arbitrary. The Labor Board having adopted them *in toto* its blanket *pro forma* findings are in no better posture. It is true that courts have sometimes affirmed the Board's orders while severely criticizing the attitude of the examiner, but in such cases the Board's findings were independently made with exacting analysis of the evidence upon which they rest, and a judicious screening of unsupported findings. This is not the situation here. With due respect for the rule that the findings of the Board are binding upon us if based upon evidence, it becomes impossible to sustain an order upon the adoption of a trial ex-

aminer's report which, upon its face, so clearly bears the imprint of bias and prejudice that it lacks all semblance of fair judicial determination.

The Board filed a petition for rehearing (R. 873-902), which was denied without opinion on June 4, 1948 (R. 903).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that bias and prejudice on the part of the Trial Examiner can be inferred solely from the Trial Examiner's rulings in the case.

2. In holding that the Trial Examiner by crediting the witnesses called by the Board and discrediting the witnesses called by the Company manifested bias and prejudice.

3. In holding that the Trial Examiner resolved all issues of credibility in favor of witnesses called by the Board.

4. In refusing enforcement of the Board's order without determining that there was no substantial evidence to support the Board's findings.

5. In holding that the Board's order should not be enforced because its findings were not independently made, but were instead an adoption of the Trial Examiner's findings which the court below believed to lack all semblance of judicial determination.

6. In failing to enforce those portions of the Board's order which were supported by undisputed evidence.

7. On the basis of its conclusion that the Trial Examiner was biased, in failing to remand the case to the Board for an independent reevaluation of the evidence.

8. In refusing to enforce the order of the Board.

SUMMARY OF ARGUMENT

I

A. If it be assumed that the court below was correct (as it was not) in holding that the Trial Examiner believed all the Board's witnesses and none of the Company witnesses when there was a conflict of testimony, there still would be no basis for setting aside a Board order not found to be unsupported by substantial evidence. The National Labor Relations Act does not provide that findings supported by substantial evidence are binding on a reviewing court unless the Board has believed all the evidence on one side of the case. Since the decision below is based entirely upon the rulings of the Trial Examiner on the evidence, and not on any conduct or personal interest manifesting bias or prejudice, the effect of the decision below is to create a new means of extending judicial review of the merits of Board findings beyond the scope allowed under

the substantial evidence rule. Other courts of appeals have uniformly ruled in identical circumstances that this cannot be done. The proper test of review under the statute is whether "all reasonable men, exercising an unprejudiced judgment would draw an opposite conclusion from the facts." If not, it would seem clear that a ruling cannot be regarded as so one-sided as to justify a court in setting it aside for bias and prejudice.

B. Many cases establish that, with respect to judges, bias and prejudice cannot be predicated upon the basis of rulings in the case. As this Court has pointed out, an administrative agency cannot "possibly be under stronger constitutional compulsions in this respect." *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 703. The courts of appeals have uniformly applied this principle under the National Labor Relations Act. See also *National Labor Relations Board v. Donnelly Garment Co.*, 330 U. S. 219, 237.

C. The decision below rests on an alleged maxim of "human experience" that all the witnesses on one side of a case cannot be falsifiers while those on the other side are truthful. The decision below is the first of any sort in any field of the law based upon any such principle. It is not at all inconceivable in human experience that witnesses engaging in a common course of conduct pursuant to an organized plan, as in conspiracy and antitrust as well as in labor rela-

tions cases, may all testify pursuant to a single false pattern. Not only are the decisions of other courts under the National Labor Relations Act inconsistent with the decision below on this point; it has never been suggested that a decision on the facts by a jury or trial court can be set aside on any such ground. The rule enunciated by the court below might induce triers of fact not to decide cases in accordance with their honest and impartial judgment, for it would impute to the fact finding official bias as a matter of law if he dared credit all the witnesses on one side of a case even if he honestly believed them to be the more truthful.

II

A. The Trial Examiner's report in this case discloses on its face the painstaking care with which he weighed each and every conflict of testimony, and sets forth in detail his reasons for believing one witness rather than another. An analysis of the report discloses at least six specific instances in which he treated the Company's witnesses as more credible, or refused to make a finding against the Company although there was evidence which would have supported such a finding. The premise of the ruling below, that the Trial Examiner had decided all evidentiary issues in favor of the Company, is thus plainly unwarranted.

B. Furthermore, analysis of the testimony of the Company witnesses whom the Trial Examiner did not believe indicates that his determinations as to their credibility were entirely reasonable. A reading of the bare printed record will indicate to an impartial reader that at least five of the major Company witnesses were evasive and not entirely truthful. In view of the similarity of the tactics employed on the seven ships here involved it is not unreasonable to infer from the unreliable testimony of many of the Company witnesses that others testifying along the same line were not entirely trustworthy. All this is apart from the Trial Examiner's obvious advantage in hearing the witnesses personally. Since it is well known that questions of credibility cannot easily be determined on the basis of a bare printed record, the absence of any clear indication on the bare record as to who was telling the truth in some instances of the conflicting testimony does not justify imputing bias to the Trial Examiner. The record thus amply demonstrates that the Trial Examiner acted impartially and fairly in resolving conflicts of testimony.

III

A. The Board's findings in this case are clearly supported by substantial evidence. This would be true even if all disputed evidence were disregarded, and only testimony which was undisputed credited.

B. The Board's order properly extended to all the ships of the Company, and not merely to those on which unfair labor practices were found to have occurred, particularly in view of the Company's practice to transfer employees among the ships.

ARGUMENT

I

A COURT MAY NOT PROPERLY REFUSE TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD BECAUSE IT BELIEVES THE BOARD'S OR AN EXAMINER'S RESOLUTION OF ISSUES OF CREDIBILITY TO BE ONE-SIDED.

The court below viewed the record in this case as showing that "Without exception, whenever there was a conflict of evidence, the witnesses for the [Company] were held [by the Trial Examiner] to be untrustworthy and those for the union reliable" (R. 871). It stated that "it is contrary to human experience that all witnesses on one side of a case are falsifiers while those on the other side are all truthful" (R. 871), and accordingly held that the Trial Examiner's one-sided rulings on credibility marked him as biased and prejudiced (R. 872). Since the Board did not make its own independent rulings on the credibility of the witnesses but adopted those of the Trial Examiner, the court held that "their infirmity must be imputed to the Board" (R. 870).

On this basis alone, and without determining whether there was substantial evidence to support the Board's findings, the court set aside the Board's order (R. 870-872).

As we shall show (Point II, *infra*, pp. 70-86), the court below erred in holding that the Trial Examiner in instances of conflicting testimony uniformly discredited the Company's witnesses and credited the Board's witnesses. However, assuming, *arguendo*, that the Trial Examiner found all of the Company's witnesses unbelievable and all of the Board's witnesses truthful, and that the Board's adoption of his rulings subjects its decision to whatever infirmity inheres in the Trial Examiner's rulings, nevertheless the court below was required to test the enforceability of the Board's order by the substantiality of the evidence to support the findings. In basing its decision solely on the nature of the rulings on evidence made by the Board and its Trial Examiner in this case, and judging those rulings by a standard other than the substantial evidence rule, the court below departed from the criteria prescribed both by administrative law generally and by Section 10 (e) and (f) of the National Labor Relations Act. The statute does not say that findings supported by substantial evidence are binding on a reviewing court unless the Board has believed all the evidence on one side of the case.

In other fields of law reviewing courts have often been urged to reverse rulings on the grounds that they were so unfair as to indicate bias although they were not otherwise legally erroneous. The courts have uniformly rejected such contentions, holding that bias and prejudice to be legally disqualifying must be manifested by something other than the rulings in a case. In so holding, reviewing courts have recognized that they are required to judge appeals in terms of the applicable rule of law, instead of assuming a broad and sweeping power to reverse rulings not otherwise legally erroneous but with which the appellate court disagreed sufficiently strongly to think the rulings biased and prejudiced. As we shall show the same reasons exist for not importing into administrative law a vague reviewability based on a reviewing court's notion that a decision which it could not find erroneous was reversible as biased and unfair.

A. JUDICIAL REVIEW ON THE BASIS OF FAIRNESS IN APPRAISAL OF TESTIMONY IS INCONSISTENT WITH THE SUBSTANTIAL EVIDENCE TEST PRESCRIBED BY SECTION 10 (c) AND (f) OF THE NATIONAL LABOR RELATIONS ACT.

In essence the court below held that courts of appeals may refuse to enforce Board orders even if they are sustained by adequate findings supported by substantial evidence if the court deems the Board's appraisal of the evidence unfair. The court below did not base its refusal to enforce the Board's order on any ground ex-

cept its judgment respecting the manner in which the Board and its Trial Examiner appraised the evidence. Though the court phrased its holding in terms of a determination that the Trial Examiner was biased and prejudiced, its opinion makes clear that the only basis for this determination of bias and prejudice was the nature of the Trial Examiner's evaluation of the credibility of the witnesses whom he heard during the trial of this case (R. 871-872).

No contention has been made by the Company that the Trial Examiner's conduct during the course of the hearing, his rulings on motions and objections, or his interrogation of witnesses, were in any way unfair or prejudicial. Neither in its "Exceptions to the Intermediate Report" (R. 846-852) nor in its argument before the Board did the Company ever allege that the Trial Examiner's conduct of the hearing was prejudicial or unfair. During oral argument before the Board, that question was specifically asked by one of the Board members of Company counsel, and the latter replied, "We are not objecting to the conduct of the trial * * * (R. 886) (Transcript of oral argument, p. 44). Neither has the Company

Compare Inland Steel Company v. National Labor Relations Board, 109 F. 2d 9, 20-21 (C. C. A. 7); *National Labor Relations Board v. Washington Dehydrated Food Co.*, 118 F. 2d 980, 985-997 (C. C. A. 9); *Montgomery Ward & Co. v. National Labor Relations Board*, 103 F. 2d 147, 149-167 (C. C. A. 8).

ever contended that the Trial Examiner had exposed his bias by overt acts or statements either on or outside of the record. Compare *Berkshire Employees Ass'n v. National Labor Relations Board*, 121 F. 2d 235, 238-239 (C. C. A. 3). Nor did the court below find that any of the Trial Examiner's rulings taken singly or in connection with other rulings was erroneous. The court below therefore arrived at its conclusion that the Trial Examiner was biased solely because of his alleged one-sided determinations as to the credibility of witnesses.

Section 10 (e) and (f) of the 1935 Act in effect provides that on petitions of the Board to enforce its orders or petitions of persons aggrieved to review its orders:

The findings of the Board as to the facts, if supported by evidence, shall be conclusive.

The Labor Management Relations Act of 1947 amended the foregoing language of the National Labor Relations Act to read:

The findings of the Board with respect to questions of fact if supported by substantial evidence in the record considered as a whole shall be conclusive.

This change in language is immaterial to the issue here presented.

* Speaking of this change in language, the Court of Appeals for the Seventh Circuit stated that "the scope of our review under the new Act is only immaterially changed from the scope of our review under the National Labor Relations Act." *National Labor Relations Board v. Austin Co.*, 165 F.

This Court has on numerous occasions granted writs of certiorari to review decisions of courts of appeals which by varying legal theories have sought to extend their scope of review of the evidence in cases decided ~~decided~~ by the National Labor Relations Board. In explaining why it granted certiorari in the first of these cases, this Court, after quoting the pertinent sentence from Section 10 (e), stated (*National Labor Relations Board v. Waterman S. S. Corp.*, 309 U. S. 206, 208-209):

It is of paramount importance that courts not encroach upon this exclusive power of the Board if effect is to be given the intention of Congress to apply an orderly, informed and specialized procedure to the complex administrative problems arising in the solution of industrial disputes. As it did in setting up other administrative bodies, Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with a general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act. And there-

2d 592; 595. ^{To} ~~The~~ the same effect see *National Labor Relations Board v. Caroline Mills, Inc.*, 167 F. 2d 212, 213 (C. C. A. 5):

fore charges by public agencies constitutionally created—such as the Board—that their duly conferred jurisdiction has been invaded, so that their statutory duties cannot be effectively fulfilled, raise questions of high importance. For this reason we granted certiorari.*

*308 U. S. 534. Cf. *Federal Communications Commission v. Pottsville Broadcasting Co.*, ante, p. 134.

In the *Waterman* case the Court reversed the Fifth Circuit stating (309 U. S., at 226):

The Court of Appeals' failure to enforce the Board's order resulted from the substitution of its judgment on disputed facts for the Board's judgment,—and the power to do that has been denied the courts by Congress.

In subsequent cases this Court has held that, even though the evidence will support either of two inconsistent inferences, it is for the Board to decide which inference is to be drawn (*National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106); that "The Board, like other expert agencies dealing with specialized fields * * * has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony." *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 597. See also *National Labor Relations Board v. Automotive Maintenance Machinery Co.*, 315 U. S. 282.

Since the decision of the court below in the instant case is the first instance in which a court has set aside a Board order on the ground that the one-sidedness of the Board's appraisal of credibility established bias and prejudice and therefore invalidated the order irrespective of the substantiality of the evidence to support it, this Court has never heretofore faced the present issue. However, we believe the ruling of the court below is but another form of extending judicial review of Board orders beyond the scope set by the substantial evidence test. The other courts of appeals which have passed on challenges to Board orders based on the fact that the Board believed all of its own witnesses and discredited all of the employer's witnesses have held that the substantial evidence rule, as set forth in Section 10 (e) and (f) of the Act and interpreted by this Court in the cases above cited,

² In the Company's brief opposing the petition for writ of certiorari (pp. 5-8) the Company cites four cases for the proposition that one-sided resolutions of credibility establish a disqualifying bias. In all of these cases the language quoted by the Company is mere dictum. In the first of these, the court enforced the Board's order in full, *National Labor Relations Board v. A. Sarforius & Co.*, 140 F. 2d 203 (C. C. A. 2). In the other three cases the court enforced that portion of the Board's order which the court held supported by the evidence. *National Labor Relations Board v. Laister-Kauffman Aircraft Corp.*, 144 F. 2d 9 (C. C. A. 8); *National Labor Relations Board v. McGough Bakeries Corp.*, 153 F. 2d 420 (C. C. A. 5); *National Labor Relations Board v. Union Pacific Stages*, 99 F. 2d 153 (C. C. A. 9).

precluded judicial relief. In *West Virginia Glass Specialty Co. v. National Labor Relations Board*, 134 F. 2d 551, certiorari denied, 320 U. S. 738, the Court of Appeals for the Fourth Circuit rejected the identical argument made by the Company in the instant case, and held that it was immaterial that the Board had actually credited all the witnesses called by the employer. The Fourth Circuit stated (134 F. 2d, at p. 552) :

These arguments might be pertinent and persuasive if we were considering the evidence in an equity case or the finding of a judge sitting without a jury in a case at law. In these cases it would be our duty to decide whether the findings were clearly erroneous, and if so, to reverse the judgment. But such is not our function in reviewing the findings of the National Labor Relations Board. In so doing it is beyond our power to resolve conflicts in the evidence or even to inquire whether the findings of the Board are so clearly erroneous that an injustice has been done.

The Court of Appeals for the Seventh Circuit, in *National Labor Relations Board v. Auburn Foundry, Inc.*, 119 F. 2d 331, found that the Board had actually credited its own witnesses as against the employer's witnesses in every instance where there was a conflict of testimony. Thus the Seventh Circuit faced a question identical to the one the court below thought was involved in the instant case. However, the Seventh Circuit

held that the statute gave it no power to refuse on this account to enforce the Board's order. That court accordingly enforced the Board's order except as to one provision which it found was not supported by substantial evidence. In reaching its decision the court stated (119 F. 2d at p. 333):

* * * in every instance where there was a conflict on a material matter between a witness for the Board and the * * * respondent, the Board gave credit to its own witness and found, as a fact, that such witness was stating the truth. A reading of the record leaves no room for doubt but that the situation is as charged. *But even so, we do not think it is within our province to say that the Board was not within its legal right. The Board apparently has the right to place its stamp of approval upon its own witnesses as against the world, if it so desires. [Italics supplied.]*

To the same effect see *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 161 F. 2d 798, 800 (C. C. A. 5); *Continental Box Co. v. National Labor Relations Board*, 113 F. 2d 93, 96 (C. C. A. 5); *Jacksonville Paper Co. v. National Labor Relations Board*, 137 F. 2d 148, 150 (C. C. A. 5), certiorari denied, 320 U. S. 772; *National Labor Relations Board v. McGough Bakeries Corp.*, 153 F. 2d 420, 421-422, 425 (C. C. A. 5); *National Labor Relations Board v.*

Bird Machine Co., 161 F. 2d 589, 590-591 (C. C. A. 1).

Under the substantial evidence rule, it is only when "all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts" (*Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U. S. 555, 566; *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300) that a court may set aside an administrative order because of insufficient evidence. If the rulings on the evidence in a case are so one-sided that "all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion", then the order must be set aside for lack of substantial evidence. But it seems obvious that where the evidentiary rulings are not so one-sided as to justify setting aside the order for lack of substantial evidence, they would not justify setting the order aside for bias and prejudice. For how can it be held that the rulings manifest bias and prejudice, if reasonable and unprejudiced men could reach the same result.¹⁰ Indeed the courts

¹⁰ In its brief opposing the petition for writ of certiorari the Company argues that the substantial evidence rule does not preclude a court from reviewing a record to determine whether "fair treatment has been accorded the parties and whether the Act has been fairly and properly applied" (p. 12). We do not disagree. We only contend that the appraisals of evidence are to be tested by the substantial evidence rule. If the Trial Examiner has improperly excluded evidence or improperly interpreted the Act, the substantial

have held that even though some of the findings in the case lack substantial evidence, that is, are so unsupported that no reasonable and unprejudiced man could draw such conclusions from the facts, this cannot be deemed to constitute bias and prejudice warranting a refusal by the court to sustain other findings in the same case which are supported. In so holding, the Court of Appeals for the Third Circuit, in *National Labor Relations Board v. Stackpole Carbon Co.*, 105 F. 2d 167, 177, certiorari denied, 308 U. S. 605, stated:

The respondent also contends that the decision of the Board and its order were invalid by reason of manifest bias and prejudice against the respondent. Certain of the conclusions of the Board, those relating to the alleged majority representation of the respondent's eligible employees by Local No. 502, were not supported by the evidence and have now been abandoned by the Board. The respondent contends in substance that because of this error the Board has demonstrated bias. To find bias in a judicial tribunal because it has committed error of this kind would destroy the usefulness of the judicial process.

evidence rule, of course, does not preclude review of other errors. *National Labor Relations Board v. Acme-Franks Co.*, 130 F. 2d 177 (C. C. A. 7) cited by the Company in its opposition (pp. 12-13) does not state any different rule of law. Moreover, since the court in that case enforced the Board's order in full, the quoted statements are mere dictum.

Accord: *Kansas City Power & Light Co. v. National Labor Relations Board*, 111 F. 2d 340, 357 (C.C.A. 8).

The court below, in the instant case, did not attempt to review the Board's findings or to determine whether there was evidence to support them. Instead of determining whether "all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion," it held the one-sided nature of the Trial Examiner's rulings to constitute bias and prejudice as a matter of law. As we shall show, we do not believe it could have found, either under established rules of law respecting bias and prejudice (*infra*, pp. 50-59) or as a matter of fact (*infra*, pp. 70-94), that the Trial Examiner was biased and prejudiced. We therefore submit, that by creating a doctrine of bias as a matter of law based entirely upon the rulings on the evidence in the case, the court below was applying a standard of review inconsistent with the substantial evidence rule embodied in Section 10 (e) and (f) of the Act and generally applicable to judicial review of administrative decisions.

1
B. WHERE THE RULINGS OF A HEARING OFFICER OR JUDGE ARE NOT LEGALLY ERRONEOUS THEY MAY NOT BE SET ASIDE ON REVIEW BECAUSE THEY ARE DEEMED TO SHOW BIAS AND PREJUDICE

Attempts by litigants to secure reversals of rulings of trial judges by urging that, even though not legally erroneous, the rulings showed

bias and prejudice have uniformly been rejected by this and other courts. In so holding this Court has laid down the principle that "the bias or prejudice which can be urged against a judge must be based upon something other than the rulings in the case." *Berger v. United States*, 255 U. S. 22, 31. And in *Tumey v. Ohio*, 273 U. S. 510, 523, this Court held that the bias charged against a trial officer must be based upon "a direct, personal, substantial, pecuniary interest" in the outcome of the case. In *Parker v. New England Oil Corp.*, 43 F. 2d 497, 498 (D. Mass.), the court stated that, "a judicial opinion, formed upon legal evidence, offered in open court in the hearing of a case is not 'personal bias or prejudice' * * * no matter how adverse or severe it may be upon the party concerned." Cf. *National Labor Relations Board v. Baldwin Locomotive Works*, 128 F. 2d 39, 45 (C. C. A. 3), and especially the concurring in part opinion of Judge Clark at p. 57.

Most of the cases in the federal courts dealing with the subject of bias and prejudice have concerned the sufficiency of affidavits filed under statutory provisions which require a judge to recuse himself whenever an affidavit charging "personal bias and prejudice" is filed. Cases holding that allegations in such an affidavit based solely on rulings in a case are insufficient to disqualify under the statute, and affirming decisions

rendered by a judge so accused, are necessarily authority for the proposition that no lack of due process inheres in a decision by such a judge. Therefore, it would appear that such decisions are fully applicable here, where no statutory provision prescribes what shall constitute a disqualifying bias in a trial examiner or administrative agency, and where only such bias and prejudice as runs afoul of the constitutional concept of fair hearing embodied in the due process clause disqualifies. As this Court has pointed out, an administrative agency "cannot possibly be under stronger constitutional compulsions in this respect than a court." *F. T. C. v. Cement Institute*, 333 U. S. 683, 703. Cf. *National Labor Relations Board v. Donnelly Garment Co.* 330 U. S. 219, 236-237.

The refusal of courts to permit a disqualifying bias and prejudice to be based on rulings of a judge has rested on several bases. It has been pointed out that there is no need "to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise." *Ex parte American Steel Barrel Co.*, 230 U. S. 35, 44. To the same effect see *Berger v. United States*, 255 U. S. 22, 31; *Saunders v. Piggly Wiggly Corp.*, 1 F. 2d 582, 586-587 (W. D. Tenn.).

Other courts have noted that it is to be expected and even desired that judges feel strongly about cases, and so long as their feeling arises

solely from the evidence presented to them, other judges should not review the strength or nature of their reactions. "It is the duty of a real judge to acquire views from evidence. The statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of a bias * * * against wrongdoers, civil or criminal, acquired from evidence presented in the course of judicial proceedings before him." *Craven v. United States*, 22 F. 2d 605, 607-608 (C. C. A. 1); also quoted in *In re Beecher*, 50 F. Supp. 530, 532 (E. D. Wash.). If bias or prejudice could be grounded in judicial rulings, there would be left "immune from attack only the amorphous dummies reprobated by Mr. Justice McReynolds as unbecoming receptacles for judicial power (255 U. S. 43). Only the timid and the incompetent, if there be now or hereafter any such on the federal bench, will be free from attack." *Craven v. United States*, 22 F. 2d 605, 608.¹⁰

¹⁰ A similar view is expressed by Jaffe, *Preceptive and investigation in Administrative Law*, 52 Harv. Law Rev. 1201, 1218-1219 (1939), who states: "It may well be that a sincere conviction as to public policy predisposes the mind where it might otherwise be in a position of doubt or balance on a conflict of fact or a choice of applicable principle. But to announce out of hand that such a state of mind constitutes a disqualification is in part Quixotic and in part non-sequitur. A strong and sincere conviction as to certain laws may exist and undoubtedly often does exist in judges. During prohibition, for example, there must have been great numbers of judges who disapproved of the law just as many disapprove of the

In most instances in which an effort has been made to establish bias or prejudice based on the rulings in the case, the only possible theory for such a charge has been that the nature of the rulings indicates that the judge had predetermined the issues. This appears to have been the theory of the finding of bias and prejudice by the court below (R. 871-872). But this and other courts have uniformly held that there is no disqualifying predetermination of a case by a judge acting only on the basis of evidence acquired during the course of his judicial duties, whether in the same case or in any other case. *United States v. Morgan*, 313 U. S. 409, 420-421; *Na-*

antitrust laws. Juries, notoriously, may believe that plaintiffs should recover from insured defendants regardless of negligence. If emotionally determined values constituted a disqualification, judges would be under constant attack and judicial-constitutional law non-existent. Nor is this entirely a matter of necessary evil. Certain persons give thanks for the predispositions of Mr. Justice Butler and certain others looked upon Mr. Justice Holmes' prejudices in favor of free speech as the most precious of safeguards. The common man juror's prejudice against insurance companies is probably the herald of a desirable change in the accident law. Pecuniary interest in the judge brings into any one litigation a purely capricious, fortuitous bias having no relation to the competing social values in the case before him. It does not follow that a hatred of monopoly is inappropriate in a Federal Trade Commissioner or of espionage and employer violence in a Labor Board Commissioner. It must be admitted that such a man is liable to find monopoly and espionage where an indifferent man would be in doubt. Put in another way it might be said that presumptions arise from special experience and conviction." Cf. *United States v. Morgan*, 313 U. S. 409, 421.

tional Labor Relations Board v. Donnelly Garment Co., 330 U. S. 219, 236-237; *E. T. C. v. Cement Institute*, 333 U. S. 683, 703; *Parker v. New England Oil Co.*, 13 F. 2d 497, 498 (D. Mass.); *Henry v. Speer*, 201 Fed. 869, 872 (C. C. A. 5). See also cases cited, pp. 57-58, *infra*. There has never been any contention in this case, and the court below did not suggest, that the Trial Examiner's rulings were motivated by any personal feeling against the Company derived from any source or interest other than the evidence adduced at the hearing. Under well-established rules pertaining to bias and prejudice, this was clearly an insufficient basis upon which to hold that he was disqualified to sit as an examiner.

• Although charges of bias and prejudice based upon rulings in the case have been raised against the Board and its Trial Examiners in other circuits, the courts have consistently refused to consider such allegations as a basis for denying enforcement of the Board's order. Compare *National Labor Relations Board v. Donnelly Garment Co.*, 330 U. S. 219, 237, reversing in this respect 151 F. 2d 854, 870 (C. C. A. 8). See also *National Labor Relations Board v. Bird Machine Co.*, 161 F. 2d 589, 590-591 (C. C. A. 1); *National Labor Relations Board v. Baldwin Locomotive Works*, 128 F. 2d 39, 45 (C. C. A. 3); *West Virginia Glass Specialty Co. v. National Labor Relations Board*, 134 F. 2d 551, 552 (C. C. A. 4), certiorari denied, 320 U. S. 738;

National Labor Relations Board v. Robbins Tire & Rubber Co., 161 F. 2d 798, 800 (C. C. A. 5); *Jacksonville Paper Co. v. National Labor Relations Board*, 137 F. 2d 148, 150 (C. C. A. 5); certiorari denied, 320 U. S. 772; *Continental Box Co. v. National Labor Relations Board*, 113 F. 2d 93, 96 (C. C. A. 5); *National Labor Relations Board v. Auburn Foundry, Inc.*, 119 F. 2d 331, 333 (C. C. A. 7).¹² We submit that these decisions are correct and should have been followed by the court below.

Although we have been unable to find any cases in which an affidavit of bias and prejudice has been based on the fact that the judge believed all the witnesses on one side and disbelieved all on the other, we have discovered several cases where

¹² The only cases cited by the Company in its brief in opposition (pp. 10-11), in which the Board's orders have been set aside on the ground that either the Board or its examiner had shown bias and prejudice, are *Berkshire Employees Ass'n v. National Labor Relations Board*, 121 F. 2d 235 (C. C. A. 3) and *National Labor Relations Board v. Phelps*, 136 F. 2d 562 (C. C. A. 5). In the *Berkshire* case the court of appeals remanded the case to the Board to consider an offer of evidence which alleged that one of the Board members had *dehors* the record; attempted to persuade an acquaintance to participate in a boycott of the Berkshire hosiery products. In the *Phelps* case, the court of appeals set aside the Board's order on the ground that the trial examiner had denied the employers a fair hearing by securing a stipulation of fact for one purpose and using it for another, by instigating the filing of a charge and the issuance of a complaint against an employer not originally named as a respondent, and by otherwise manifesting a one-sided attitude. In none of the cases cited by the company has it been held that a disqualifying bias and prejudice could be based on rulings which were not themselves so erroneous as to necessitate a reversal.

such an affidavit alleged that in a large number of cases involving issues similar to the one in which the affidavit was filed, the judge had consistently ruled one way. Thus, in *Craven v. United States*, 22 F. 2d 605, 607-608 (C. C. A. 1), the affidavit of bias and prejudice alleged that the District Judge had imposed heavy fines against all defendants charged with violating liquor laws. In *In re Beecher*, 50 F. Supp. 530, 532 (E. D. Wash.), an affidavit of bias and prejudice filed against the District Judge alleged that he had ruled against farmer debtors in thirty-one cases then pending on appeal. In *Sacramento Suburban Fruit Land Co. v. Tatham*, 40 F. 2d 894 (C. C. A. 9), certiorari denied, 282 U. S. 874, the affidavits of bias and prejudice stated that the District Judge had ruled against the Sacramento Suburban Fruit Land Co. consistently in numerous other cases of like character. A count of the cases referred to, and related cases in the same volume of the Federal Reporter, shows that the same judge had presided in at least twenty-eight cases involving similar suits against the Sacramento Suburban Fruit Land Company, of which seventeen had been reversed on appeal prior to the decision in 40 F. 2d 894.¹³ In the *Craven*, *Beecher* and *Sacramento* cases the affi-

¹³ The seventeen cases in which the Sacramento Fruit Land Company secured reversals are reported in 36 F. 2d 907; 912; 917; 923 (two cases); 926; 928; 929; 935; 936; 938; 946; 947 (two cases); 948; 949; 950. The cases in which the trial

affidavits of bias and prejudice were held insufficient upon the ground stated above (pp. 51-56, *supra*), that a disqualifying bias and prejudice could not be based upon rulings made in the course of judicial proceedings. Similarly, in *Parker v. New England Oil Corp.*, 13 F. 2d 497 (D. Mass.), an affidavit was held insufficient although the court stated (at 497):

The affidavit of prejudice states facts the legal effect of which may be summarized as follows:

A proceeding having been instituted, seeking to charge A, B, and C with fraud and imposition on the court, the judge who heard the cause became convinced by the evidence that the defendants were guilty of the fraud and imposition charged against them, and that D (not a party to the proceedings) was actively associated with them in their wrongdoing. And the judge so found in formal opinions, in which he severely criticized D's conduct. When the proceeding had been heard and determined, and was ready for final judgment and execution, D was for the first time summoned in as a party defendant. He thereupon filed an affidavit of prejudice in proper form, stating the facts in detail, and asserting that by reason of them, the judge had a personal bias or prejudice against him and was disqualified.

judges who were affirmed on appeal are reported in 36 F. 2d 921; 922; 925; 927; 932; 933; 934; 937; 939; 941; 948.

Again the court held that this affidavit was insufficient because based solely on rulings made earlier in the proceeding.

If the court below were justified in testing the Trial Examiner's fairness upon the basis of his determinations respecting the credibility of witnesses in the instant case, it could as well be argued that his fairness should be tested by his resolutions of credibility issues in other cases. As appears from the reported decision in *Matter of Midland S. S. Lines*, 65 N. L. R. B. 519, in which the intermediate report was issued about six months before the intermediate report in the instant case, the same Trial Examiner presided, the charging union, the National Maritime Union, was the same as the union involved in the instant case, and the employer charged with unfair labor practices was another steamship line operating on the Great Lakes. The Trial Examiner there credited witnesses for the company as against the witnesses called by the Board and who supported the position of the N. M. U., and as a result dismissed the charges of unfair labor practices against the Midland S. S. Company. This hardly suggests a bias in favor of Board witnesses, or of the National Maritime Union.

C. A TRIER OF FACTS MAY PROPERLY BELIEVE THAT ALL OF THE TESTIMONY OF THE WITNESSES ON ONE SIDE OF A CONTROVERSY IS HONEST AND ALL ON THE OTHER DISHONEST.

Although, as discussed hereinafter (*infra*, pp. 70-86), the Trial Examiner did not credit all of

the Board witnesses and discredit all of the Company's witnesses, we shall assume for the purpose of this discussion that the finding of the court below in this respect was correct. Based upon that finding the court stated what it considered to be a well established legal maxim that " * * * it is contrary to human experience that all witnesses on one side of a case are falsifiers while those on the other side are all truthful * * * " (R. 871). We submit that this proposition, which the court believed to be well recognized, is without foundation and contrary to established legal doctrine.

The only authority cited by the court below in support of its theory is a dictum from *National Labor Relations Board v. A Sartorius & Co.*, 140 F. 2d 203, 205 (C. C. A. 2).¹⁴ But see *National Labor Relations Board v. Bird Machine Co.*, 161 F. 2d 589, 590-591 (C. C. A. 1); *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 161 F. 2d 798, 800 (C. C. A. 5); *National Labor Relations Board v. Auburn Foundry, Inc.*, 119

¹⁴ In the *Sartorius* case the Second Circuit said, " * * * if an administrative agency ignores all the evidence given by one side in a controversy and with studied design gives credence to the testimony of the other side, the findings would be arbitrary * * * " (140 F. 2d at p. 205). However, the intermediate report of the Trial Examiner upon its face shows that this statement is not applicable to the instant case, since in every finding based upon disputed testimony he discussed the evidence offered by both sides and set forth in detail his reason for crediting one over the other.

F. 2d 331, 333 (C. C. A. 7). In the *Auburn* case the Seventh Circuit stated that (119 F. 2d, at p. 333), "The Board apparently has the right to place its stamp of approval upon its own witnesses as against the world, if it so desires."¹⁵ This was cited almost verbatim by the First Circuit in the *Bird* case. Clearly the position adopted by the First and Seventh Circuits contradict the possibility suggested by the court below that only a biased judicial officer could credit all witnesses on one side of a dispute.

The same question was raised before the Fifth Circuit in the *Robbins* case, and that court stated what we submit is the correct rule to be applied to such cases. The court said (161 F. 2d at p. 800):

* * * [the function of the court under the Act] is to determine whether the Board's findings are supported by evidence and the order is in accordance with law. Of course, even though the findings were supported by evidence; we could not find the order in accordance with law if it appeared that the hearings were conducted unfairly * * *. The fact alone, however, of which Respondent makes so much, that Examiner and Board uniformly

¹⁵ The Seventh Circuit found in the *Auburn* case that the Board had actually credited all of its witnesses and discredited all of the respondent's witnesses (119 F. 2d at p. 333). The Seventh Circuit definitely stated that no legal prejudice could result from this.

credited the Board's witnesses and as uniformly discredited those of the Respondent, though the Board's witnesses were few and the Respondent's witnesses were many, *would not furnish a basis for a finding by us that such a bias or partiality existed and therefore the hearings were unfair.* Unless the credited evidence * * * carries its own death wound, that is, is incredible and therefore, cannot in law be credited, and the discredited evidence, * * * carries its own irrefutable truth, that is, is of such nature that it cannot in law be discredited, *we cannot determine that to credit the one and discredit the other is an evidence of bias.*¹⁶ [Italics supplied.]

Aside from the cases involving the National Labor Relations Board, referred to above (*supra*, pp. 60-62), we have found no cases which specifically discuss the question whether it is possible for all witnesses on one side of a case to be more truthful than all on the other.¹⁷ We believe that such lack of authority supports our position that human experience does not

¹⁶ *Accord, National Labor Relations Board v. Remington Rand, Inc.*, 94 F. 2d 862, 873 (C. C. A. 2), certiorari denied, 304 U. S. 576; *West Virginia Glass Specialty Co. v. National Labor Relations Board*, 134 F. 2d 551, 552 (C. C. A. 4), certiorari denied, 320 U. S. 738; *Continental Box Co. v. National Labor Relations Board*, 113 F. 2d 93, 96 (C. C. A. 5); *Jacksonville Paper Co. v. National Labor Relations Board*, 137 F. 2d 148, 150 (C. C. A. 5), certiorari denied, 320 U. S. 772.

¹⁷ Cf. *United States v. Aluminum Corporation of America*, 148 F. 2d 416, 433-434 (C. C. A. 2).

deter an unprejudiced trier of fact from believing the testimony on one side of a controversy to the exclusion of the testimony on the other side. Otherwise the matter would certainly have been mentioned in earlier cases, and discussed in texts and law review articles dealing with questions of evidence or judicial bias. Indeed in any case in which all the witnesses on one side agree as to the facts of an incident in contradiction to the witnesses on the other side, it necessarily follows that one group of witnesses or the other is telling an untruth, and that the trier of the facts is entitled to believe one or the other in its entirety. Unless a judge or other trier of the facts could so find, he might be unable to decide such a case. It is not at all inconceivable that a similar situation may arise with respect to witnesses engaging in a common course of conduct pursuant to an organized plan, such as the Board found to exist in the instant case (R. 824), and such as could frequently occur in conspiracy and antitrust as well as labor relations cases. We have never heard of a judge charging a jury that in determining credibility they may not believe all the witnesses who testified for the defendant, or vice versa. Yet obviously, in many criminal cases, where the defense has rested solely upon an alibi, and the defendant has produced numerous witnesses who all agree on the facts, the jury must have believed all or none of them in deciding whether to convict or acquit.

In some of the reported cases, although the court did not discuss the point, it is obvious that only the witnesses on one side were believed. For instance, in *Scott v. Beams*, 122 F. 2d 777 (C. C. A. 10), certiorari denied, 315 U. S. 809, where approximately 600 persons claimed to be the heirs of an illiterate, restricted Indian who died at a ripe age leaving an estate valued at more than \$1,000,000, it appears from the opinion that a family settlement, prepared during the course of a long trial to litigate heirship, recited that all the persons in three groups of claimants denied that any of the persons in forty-seven other groups were related to the deceased (122 F. 2d at 785). Apparently a large number of the claimants in the various groups testified inconsistently as to their relationship. Various affidavits of prejudice were filed near the end of the trial by claimants in the forty-seven other groups, based in part upon rulings, statements and conduct of the judge during the trial. The affidavits were held insufficient. In affirming a judgment finding only the three groups related, the Tenth Circuit stated (122 F. 2d at 789):

It is urged with emphasis that the trial, including the making of findings of fact, failed to reflect that calm and deliberate consideration of the evidence and that judicial impartiality which are consonant with the principles of justice and of due process of law. * * * The record indicates that

* * * the court was justified in the belief that some of the testimony was fabricated. * * * The ends of justice would therefore not be furthered with reasonable dispatch by ordering a retrial.

In the recent decision in *Styles v. Local 760, etc.*, 80 F. Supp. 119 (E. D. Tenn.), the regional director for the National Labor Relations Board had petitioned the court for a temporary injunction pursuant to Section 10 (b) of the amended Act, alleging that he had reason to believe that the respondents, a labor union and its agents, were violating Section 8 (b) (4) (A) of the Act. The major question presented to the court for determination was whether a hundred men, all members of the respondent union, had simultaneously decided to terminate their employment, or whether they had actually been induced or encouraged by the respondents to engage in a strike. A hearing was had and considerable oral evidence adduced. All of the striking employees who appeared as witnesses, some dozen in number, testified that they had decided voluntarily to terminate their employment and that the respondent union and its agents had not suggested in any way that they go on strike. The court apparently rejected that testimony in its entirety, although it did not say so specifically. The court did say (80 F. Supp. at pp. 120-121): "Over one hundred employees were involved in the work

stoppage. * * * It is apparent that in quitting they sought to avoid the status of strikers. A number of them * * * gave as their reason that they were quitting for better jobs, and this was the general explanation the employees gave of the stoppage. Applied to a single individual, the reason probably would have been credible. It inspires no confidence, however, when applied to a hundred men, who are members of the same local * * * and who quit their jobs almost en masse."

The opinion of the court in the *Styles* case is definitely indicative that the judge did not, and could not honestly, believe any of the respondents' witnesses since they all testified substantially to the same effect.

An interesting corollary to the *Styles* case is the fact that the hearing before the Board, following the issuance of the temporary injunction, was conducted for the Board by the same Trial Examiner who is involved in the present proceeding. Practically all the witnesses who appeared before the court in the *Styles* case testified at the Board hearing, and their testimony was substantially the same as they gave in court. The Trial Examiner issued his intermediate report (*In the Matter of Local 760, etc. and Roane-Anderson Company*, Case No. 10-CC-11, decided November 5, 1948, not yet reported), wherein he too discredited all the witnesses called by the respondent

union, stating "their testimony that their quitting was entirely a matter of personal decision is not such as to invite credence." Under the maxim laid down by the court below both the District Court Judge and the Trial Examiner must be presumed guilty of bias, although each independently arrived at the same conclusions concerning the credibility of the union's witnesses.

That there is no such rule as the one relied upon by the court below is evidenced by the fact that in a jury trial "a question may be for the court if all the testimony on the one side is wholly unworthy of any credibility." *Abbott's Civil Jury Trials*, Fifth Edition, 1935, p. 630. It is evident therefore that an impartial and fair-minded judicial officer may actually determine upon his observation of the witnesses and the hearing of their testimony that all witnesses on one side are untruthful and find accordingly.

Prior to the decision of the court below in the instant case we know of no rule in American jurisprudence which has limited the power of a trial court, or a jury, to determine credibility. In fact the courts have stated that, "It is impossible to prescribe any fixed rule by which the credibility of the witness is to be tested, or which shall bind the conscience of the court as to the conclusiveness of the evidence in a given case * * *". *United States v. Lee Huen*, 118 Fed. 442, 459 (N. D. N. Y.). To the same effect see IX *Wigmore, Evidence*, Sec. 2551, p. 503. See

also *Davis v. Schwartz*, 155 U. S. 631, 636. We submit therefore that the court below erred in adopting a rule in this case which is contradictory to all accepted standards of judicial discretion.

We do not know whether the court below intended to have its maxim apply to judges and juries, although there is no reason why, if it is an accurate expression of human experience, it should not be applicable to all triers of fact.¹⁸

Judges and juries are not as likely to face this problem as administrative officers, since they are not required to set forth in such great detail each and every resolution of conflicting testimony and their reasons for decision. It is interesting, however, to note in this respect a statement by Professor Edmund M. Morgan¹⁹ that,

a distinguished United States judge suggested to the writer that the assignment of such a reason [failure to meet the burden of proof] might frequently be due to the desire of the judge to avoid unpleasant reflections upon witnesses and parties whose testimony he had in fact discredited.

Irrespective of its applicability to judges and juries, we are certain that the rule would apply to almost all federal administrative tribunals, since they are now required to set out in detail

¹⁸ Cf. *Gunning v. Cooley*, 281 U. S. 90, 92-95, and the cases cited therein.

¹⁹ Morgan, *Choice of Law Governing Proof*, 58 Harvard Law Review 153, 191, n. 89 (1944).

in their decisions the resolutions of credibility upon which they base their findings. Administrative Procedure Act, Sec. 8 (b) (60 Stat. 237, 5 U. S. C. 1001, *et seq.*).²⁰ We therefore believe that a reversal of the decision of the court below is important to the entire field of administrative law. The decision, if permitted to stand, may have an adverse effect not only upon the trial examiners of the Board but upon all hearing officers.

The normal objective of rules governing judicial administration is to free trial officers and judges from all extraneous influences which might tend to induce them to decide issues otherwise than in accordance with their honest and impartial judgment. The rule here enunciated by the court below, however, operates quite to the contrary. It erects an artificial barrier to honest and impartial resolution of issues of credibility by saying that if the judge dares to credit all the witnesses on one side, even if he honestly believes them to be the more truthful, he is *ipso facto* guilty of bias. Hearing officers faced with the alternative of inviting a charge of bias or crediting a witness whom they do not honestly believe may be tempted to follow the latter course. Such results, we believe, are incompatible with the objectives which sound principles of judicial administration should foster.

²⁰ See *infra*, pp. 75-76.

II

THE TRIAL EXAMINER'S RESOLUTION OF ISSUES OF CREDIBILITY WAS FAIR AND JUDICIOUS

An analysis of the Trial Examiner's intermediate report and of the evidence discloses no such completely one-sided findings on credibility by the Trial Examiner as the court below assumed (R. 871). On the contrary, the intermediate report discloses on its face the painstaking care with which the Trial Examiner weighed each and every conflict in testimony, and sets forth in detail his reasons for believing one witness rather than the other. Furthermore, the intermediate report clearly establishes upon its face that the court below was in error in concluding that the Trial Examiner had ruled against the Company on every issue. Thus, in at least six specific instances the Trial Examiner either found that the Company's witnesses were ~~more credible or failed to find against the Company~~ although there was evidence which would have supported such a finding.

A. THE TRIAL EXAMINER DID NOT UNIFORMLY RULE AGAINST THE COMPANY

1. *Chrobak and Shartle*. Second Mate Chrobak, a Company witness, testified that upon one occasion employee Shartle, while operating a winch, failed to place a control lever in a proper position, a mistake which if not corrected in time

could have resulted in a parting of the cable and possible injury to a bystander, and that he, Chrobak, took the controls away from Shartle in time to avert an accident (R. 335-336). Chrobak's testimony was supported by the hearsay testimony of another company witness, Third Mate Hewer (R. 524-525). Board witness Shartle testified that he remembered no occasion when the second mate had to take the winch controls away from him (R. 191), and upon further questioning denied that there had been such an occasion (R. 192). The Trial Examiner credited the testimony of the Company's witnesses in this respect (R. 835-836), and found that "although Shartle, whose testimony the undersigned considered to be generally credible, denied during cross-examination as a Board witness any recollection of this incident, the undersigned nevertheless believes that this incident occurred" (R. 836, n. 43).

2. "*Jim Crow*" Pamphlets. The Trial Examiner refused to find the Company responsible for the distribution of the pamphlet "NMU Fights Jim Crow" although there was evidence which, if credited, would have supported such a finding (R. 804; 645, 762-771). It is undisputed that the pamphlet was originally prepared by the Union as part of its anti-discrimination campaign on the coasts. However, every union organizer who testified concerning the pamphlet insisted that it had not been distributed on the Great Lakes by the Union,

because the Union knew that Lake seamen were not ready to accept Negroes as equals (R. 20-21, 54-56, 88; 103, 132, 234, 588; 612-613). However, soon after the commencement of the Union's organizational campaign, the "Jim Crow" pamphlet appeared on the Company's ships and was used by the Company's officers as the basis of a campaign aimed at "playing upon the racial prejudices, antagonisms and fears of the employees" (R. 803-804; *supra*, pp. 25-27). The Company's chief mail clerk, Norma Cruikshank (R. 656), denied that the pamphlet had gone through the regular distribution channels used by the Company (R. 658). But, there is evidence in the record that the Company may have been responsible for the pamphlet reaching the employees. Thus, seaman Weissflog testified that Captain Gerlach of the *Morse* gave the pamphlets to a member of the crew with instructions to distribute them among the other crew members (R. 54). The crew member who distributed the pamphlets told the others that "the Captain is pro-NMU; and he is issuing NMU pamphlets" (R. 55). Captain Gerlach did not deny this testimony, and admitted that he had seen the "Jim Crow" pamphlets, which had come aboard through the mail (R. 316). Captain Brinker of the *Filbert* testified that the Company customarily sends circular letters to the crew by forwarding them in bulk to the captain for distribution among the employees (R. 421).

and that the "Jim Crow" pamphlet reached him in the same manner (R. 427). In the light of this evidence, the specific statements made by Union organizers that the Union was opposed to the distribution of the pamphlet on the lakes, and the use to which it was put by the Company's supervisors, the Trial Examiner could have justifiably found that the Company was responsible for the distribution of the "Jim Crow" pamphlets among the employees. His ruling to the contrary (R. 804) is therefore plainly inconsistent with the view of the court below that he resolved every conflict in evidence against the Company.

3. *Herrick testimony.* Another illustration is the Trial Examiner's treatment of the testimony of Walter Herrick, an oiler on the *McGontagle* (R. 233-247). Herrick testified that Captain Penzenhagen, on numerous occasions, had made coercive and threatening anti-union statements to members of the crew (R. 235-236, 238, 241). Herrick however, did not himself hear the captain, but the statements were repeated to him shortly afterward (R. 238, 241, 244). Although the Board attorney stated to the Trial Examiner that considerable effort had been made to locate and produce the seamen who had heard the statements (R. 241-242), and no contrary testimony was introduced by the Company, the Trial Examiner refused to rely upon Herrick's testimony because of its hearsay character (R. 814,

n. 12). The Trial Examiner, if he were as biased as the Company alleges, could very well have credited such testimony, since, under Section 10 (b) of the original Act (*infra*, p. 197), the Board was not bound by the "hearsay rule" and had made findings based upon hearsay testimony in numerous cases where, as here, its nature is such that reasonable men would rely upon it in connection with important affairs.²¹

In addition to the instances discussed immediately above (pp. 76-74), wherein the Trial Examiner on the face of his intermediate report resolved issues in favor of the Company, there are a number of other incidents in which the evidence is conflicting and which were not mentioned by the Trial Examiner because he did not believe the version testified to by the Board's witnesses. The Board's procedures require its trial examiners to set forth in their intermediate reports all the material evidence upon which they rely to support their find-

²¹ Compare *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229-230; *National Labor Relations Board v. Service Wood Heel Co.*, 124 F. 2d 470, 472-474 (C. C. A. 1); *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. 2d 862, 873 (C. C. A. 2), certiorari denied, 304 U. S. 576; *Union Dragnet Steel Co. v. National Labor Relations Board*, 109 F. 2d 587, 592 (C. C. A. 3); *Martel Mills Corp. v. National Labor Relations Board*, 114 F. 2d 624, 629 (C. C. A. 4); *National Labor Relations Board v. American Pot. & Chem. Corp.*, 98 F. 2d 488, 493-494 (C. C. A. 9), certiorari denied, 306 U. S. 643.

ings. In order not to burden their reports with discussion of evidence not necessary to support the conclusions reached, trial examiners have developed the practice of omitting discussion of Board testimony which they did not credit, or employer testimony which they did credit, and which they did not believe to be material to the ultimate determination of the case.²² Thus, in the instant case the Trial Examiner stated (R. 807, n. 6) :

No attempt will be made to describe all statements and activities claimed by counsel for the Board to constitute part of respondent's course of anti-union conduct. Thus, no mention is made of those incidents which the undersigned regards as insubstantial in character or as *unsupported by a fair preponderance of credible evidence*. [Italics supplied.]

The Administrative Procedure Act was not passed until June 1946, about six months after the issuance of the intermediate report in the present case and therefore does not govern this case. However, Congress therein gave its approval to the practice of omitting from decisions those matters which, although controverted, were determined not to be material to the decision of the case. Section 8 (b) of the Administrative Procedure Act provides in part: "All decisions (including initial, rec-

²² Cf. *National Labor Relations Board v. Swift & Co.*, 116 F. 2d 143, 145 (C. C. A. 8).

omitted, or tentative decisions) shall * * * include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the *material issues of fact, law, or discretion* * * *." [Italics supplied.]

2. The legislative history shows that although the Congress intended that agency decisions be as detailed as necessary, it also recognized and wished to make clear that agencies were not thereby required to clutter their decisions with discussions of evidence not material to the ultimate finding. Thus the Senate Judiciary Committee stated in its report (Senate Report No. 752, 79th Cong., 1st Sess., pp. 24-25):

Findings and conclusions must include all the *relevant* issues presented by the record in the light of the law involved. They may be few or many. *A particular conclusion of law may render certain issues and findings immaterial, or vice versa.* Where oral testimony is conflicting or ~~subject~~ to doubt of its credibility, the credibility of witnesses would be a necessary finding *if the facts are material.* [Italics supplied.]

To the same effect see the report of the House Committee on the Judiciary (H. Rept. No. 1980, 79th Cong., 2nd Sess., p. 39).

Since, as shown above, *supra*, p. 75, the Trial Examiner had stated that he did not mention in his intermediate report incidents wherein he re-

solved the conflicts in testimony against the Board witnesses, and therefore saw no reason to discuss them (R. 807, n. 6), we shall set forth herein a few such incidents to show that the Trial Examiner did not, as stated by the court below, repudiate every witness for the Company "because of falsity, evasion or faint recollection," and did not exalt "every union witness as truthful, forthright and accurate" (R. 872).

4. *Weissflog and Todd.* In the spring of 1944, the Steamer *Morse* was tied to the dock at Conneaut. Seaman Weissflog, a union organizer (R. 819; 54), and some ten or twelve other seamen had gone ashore to the union hall and had returned to the ship about one hour late (R. 820; 59). According to Weissflog's credited testimony, after the ship had sailed Captain Gerlach singled out Weissflog for reprimand in the presence of other members of the crew (R. 820; 58-59). When Weissflog protested that he had not been alone and asked the Captain why he did not also reprimand the other seamen who were late the Captain replied, "I am not worried about the other men. All I am worried about is you. You are the organizer on this ship, and you are the only one I am concerned with." At the same time Captain Gerlach stated that Weissflog was "nothing but a communist", "he was glad to get rid of [Weissflog]", and that the latter was "corrupting the morals of the young seamen on the

lakes". (R. 820-821; 58-59.) Captain Gerlach testified that he did speak to Weissflog about coming back late, but denied that he had selected only him for discipline or that he had in any way treated Weissflog differently from the other seamen because he was known to be a union organizer (R. 821; 309, 319-322, 331). The Trial Examiner found Weissflog's version of the incident to be the more credible (R. 821).

However, in connection with the same incident of returning late to the ship, Weissflog testified that First Mate Todd (R. 575) had also singled out Weissflog for reprimand (R. 59-60). Weissflog's testimony on this point was corroborated by that of Seaman Zmrazek (R. 44-45, 48-50). First Mate Todd testified that he reprimanded both Weissflog and Callahan, a wheelsman, and when Weissflog protested his failure to speak to the others he explained that they were members of the engine crew and not under his jurisdiction (R. 575-576, 581, 589-590). Although Weissflog had testified that First Mate Todd "wasn't interested in anyone else" (R. 59), which statement was denied by the mate (R. 589), the Trial Examiner did not discuss the incident in his intermediate report, despite the similarity of language charged to the captain and the mate (R. 58-59), and the fact that it could well have been used to bolster the 8-(1)st finding that the Company, by its officers, restrained "Weissflog from engaging

in legitimate union activities" (R. 822). Presumably therefore the Trial Examiner must have accepted First Mate Todd's version of the incident, and rejected the testimony of Weissflog and Zmrazek.

5. *Vogt and the Cornell*: Although considerable testimony was introduced by the Board and the Company concerning statements made by the ship's officers on board the Steamer *Cornell*, the Trial Examiner did not include any of these occurrences in his findings, apparently because he did not credit the testimony of the Board's witness. Nor can it be said that the Trial Examiner did not discuss these incidents because they were not violative of the Act, since he did find that similar statements made by officers of other ships were unfair labor practices.

Thus seaman Vogt, a Board witness, testified that before the *Cornell* sailed the entire crew was assembled and addressed by Captain Lawless and Chief Engineer Heckel (R. 87-88). That among other things, Captain Lawless told the men "you don't have to belong to any union, and, especially, the C. I. O. or N. M. U., to hold your job on this Boat" and that, he, Lawless, "wouldn't have anything to do with the N. M. U. or C. I. O." (R. 88). Vogt testified further that Chief Engineer Heckel stated that "he thought the same way as the captain did about the C. I. O. and the N. M. U. That was—they were just a bunch of agitators and Communists and Jews" (R. 88).

Captain Lawless, the Company's witness, on the other hand, testified that he merely told the men that an N. M. U. election was pending; no one had to join the Union to work on his ship; no one would be discriminated against in any way for joining the Union; and that he had referred to Vogt as an example of a union man who had not been discriminated against (R. 469). Captain Lawless also testified that he had heard Chief Engineer Heckel's speech and that the latter made no reference to unions, either expressly or by inference (R. 469). Chief Engineer Heckel testified substantially as did Captain Lawless in regard to the speeches, and denied that he, Heckel, had mentioned unions (R. 543-544).

Board witness Vogt also testified that while on board the *Cornell*, First Mate Burns made remarks to him and Wheelman Hiers "such as if the Union did get in on the Pittsburgh boats that they would have nothing but niggers working with the white crews. You would be sleeping and eating with them"; and that "the N. M. U. is a bunch of Communists and agitators; and he was deathly against Negroes, even though there were Negroes in the galley crew on there" (R. 91). First Mate Burns denied that he ever had any conversation with Vogt in regard to the Union or union issues or that he had made any of the statements attributed to him by Vogt (R. 554-555, 560, 561-563).

It is only necessary to compare the statements attributed to Captain Lawless, Chief Engineer Heckel and First Mate Burns with similar statements made by the officers of other ships to dispel any doubt that such statements, if *Vögl's testimony had been found to be credible*, would have been related as testimony supporting the finding of unfair labor practices.²³

6. *Weissflog v. Haller and Zyp*. In accordance with well established judicial practice, the Trial Examiner on several occasions credited testimony of Board witnesses which was substantially uncontradicted, but apparently did not credit other portions of the same testimony which were denied, although the evidence which he did not credit and did not discuss was similar to other controverted

²³ In view of the Trial Examiner's findings concerning similar statements charged to, (1) Captain Brinker of the Steamer *Filbert* (R. 809-810); (2) Captain Wallace and First Assistant Engineer Anderson of the Steamer *Johnson* (R. 812-813); (3) Captain Penzenhagen of the Steamer *McGonagle* (R. 813-814); (4) Captain Lawless (the same captain who later commanded the *Cornell*), Third Mate Carr and Third Assistant Engineer Scharmin of the Steamer *Bunson* (R. 814-815); (5) Second Mate Zyp and Chief Engineer Haller of the Steamer *Morse* (R. 820); and (6) Captain Murray and the chief engineer (not identified by name) of the Steamer *Olds* (R. 822), it is reasonable to assume that the Trial Examiner did not include in his discussion of the evidence the statements charged to the officers of the *Cornell* because he had credited the denials that such statements were made, and therefore a recital of the evidence as to them would not add anything to his findings of unfair labor practices.

statements which were found to be unfair labor practices.

For example, seaman Weissflog testified that while serving on board the Steamer *Morse*, he and Chief Engineer Haller, in the presence of other crew members, engaged in numerous debates concerning the Union and its program (R. 820; 57-58). Weissflog stated that in the course of such conversations Chief Engineer Haller accused the Union of lying to the membership about its rotary shipping program (R. 820; 58). The Chief Engineer testified that he did have such conversations with Weissflog and substantially admitted the charge when he testified on that point that "I never said they were lying; I just commented about it" (R. 820; 606). The Trial Examiner credited Weissflog's testimony because, as he stated, it was "substantially undenied" (R. 820). However, Weissflog had also testified that during the same conversations Chief Engineer Haller had said that the Union was lying about other phases of its program; that it was "slandering the legitimate seamen on the Great Lakes"; and that "the only reason [the Union was] up there was to drive the old-time Lake seamen off the Lakes and put Communistic Red stooges from the salt water on" (R. 58). Chief Engineer Haller specifically denied having made any of these statements (R. 606), and the Trial Examiner did not mention them in his report although he had

found that similar statements made by Captain Gerlach (R. 819, 821), and by Captain Lawless, Third Mate Carr and Third Assistant Engineer Scharmin of the Steamer *Bunson* (R. 814-815), were designed to "discourage and frustrate the organizational efforts of the Union" (R. 824).

The Trial Examiner in like manner also credited only part of Weissflog's testimony as to statements alleged to have been made by Second Mate Zyp (R. 820). Thus Weissflog testified that while in the wheelhouse he and the wheelsman engaged in conversations about the Union with Second Mate Zyp (R. 820; 63). On one occasion, while discussing the pamphlet "N. M. U. Fights Jim Crow" (R. 645, 762-771), Second Mate Zyp stated that "he would never sail with a nigger" and accused Weissflog of "agitating" among members of the crew (R. 820; 63, 598-599, 602). Second Mate Zyp specifically admitted making both statements (R. 820; 598-599), and the Trial Examiner discussed them in his report (R. 820).

Weissflog in his testimony had also accused Second Mate Zyp of calling him a Communist; "a salt water bastard"; a "no good Communist bastard"; and "a salt water stiff" (R. 66-67). Weissflog also stated that the second mate had accused him of "trying to bring salt water men up here" (R. 67). Second Mate Zyp denied that he had called Weissflog such names, or had made such accusations against him (R. 598). Although,

as stated above (*supra*, p. 81, n. 23), similar statements and disparagement of union organizers by ship's officers in the presence of members of the crew had been found by the Trial Examiner to be violative of the Act (R. 826-828), the Trial Examiner only credited that part of Weissflog's testimony which had not been denied by Second Mate Zyp (R. 820).

We submit that, in the light of the findings of the Trial Examiner concerning other such incidents, the only logical inference that can be drawn from the Trial Examiner's limited discussion of the charges alleged by Weissflog is that the Trial Examiner only credited the Board witness as to those statements which were undisputed, and credited the Company's witnesses in all other respects.

Upon the foregoing incidents we submit that the Trial Examiner was not biased against the Company; he did not resolve "every conflict in testimony, whether serious or trivial, in favor of the Union" (R. 872). Thus the principle (assuming its existence) enunciated by the court below, "that it is contrary to human experience that all witnesses on one side of a case are falsifiers while those on the other side are all truthful" (R. 871), is not applicable to the Examiner's conduct in this case at all. The court below obviously did not examine the record carefully enough before coming to its sweeping conclu-

sions, for, as we have shown, the Trial Examiner did credit the Company's witnesses and refused to credit Board witnesses where he felt that the former were the more truthful. Obviously, had the Trial Examiner foreseen the impression his report would create in the mind of the court below, he would have foregone his choice of brevity and would have discussed at length each and every controverted issue, whether or not material to the ultimate determination of the case.

To recapitulate, an analysis of the entire record reveals that the Trial Examiner, in a comparatively large percentage of the instances wherein there was conflicting testimony, did credit the testimony of Company witnesses and refused to credit the testimony of Board witnesses. Twelve witnesses testified for the Board and twenty-four for the Company. At least seven of the twelve Board witnesses' testimony conflicted in some respects with testimony of Company witnesses. Three of the seven (Lee, Babin, and Vogel) were credited in every respect in which their testimony conflicted with that of Company witnesses; four of the seven (Weissflog, Zmrazek, Vogt, and Shartle) were credited in some but not in all respects in which their testimony conflicted with that of Company witnesses. At least sixteen of the twenty-four Company witnesses' testimony conflicted in some respects with testimony of

Board witnesses. Five of the sixteen (Todd, Zyp, Haller, Heckel, and Burns) were credited in all respects in which conflicts appeared; three of the sixteen (Lawless, Chrobak, and Hower) were credited in some but not credited in other respects in which their testimony conflicted with that of Board witnesses; the remaining eight of the sixteen (Gerlach, McGuinness, Lehne, Brinker, Dobson, Hunger, Carr, and Murray) were not credited in any respect in which their testimony conflicted with that of Board witnesses.

We submit, therefore, ~~that the court below~~ erred in finding, ~~as it did,~~ that "without exception, whenever there was a conflict of evidence, the witnesses for [the Company] were held to be untrustworthy and those for the union reliable" (R. 871).

B. THE CORRECTNESS OF MANY OF THE TRIAL EXAMINER'S RESOLUTIONS OF CONFLICTING EVIDENCE CAN BE DEMONSTRATED FROM THE RECORD.

Furthermore, we contend that the Trial Examiner fairly and judiciously decided each and every conflict in testimony. His findings are not arbitrary and are amply supported by the record. The Trial Examiner most definitely did not "ignore all the evidence given by one side in [the] controversy, and with studied design give credence to the testimony of the other side" (R. 871), for the intermediate report clearly shows that in resolving every conflict in testimony the Trial

Examiner carefully weighed all the evidence and determined which of the witnesses were to be believed. In addition, the Trial Examiner had the advantage of having seen the witnesses on the stand, watched their actions and expressions and heard their answers to questions. This factor, which weighs so heavily in the resolution of conflicts in the testimony of witnesses, obviously must be taken into consideration when reading a cold printed record. It is for that reason that appellate courts will not reverse a lower tribunal on factual issues, except in the most extreme cases where there is no evidence whatsoever to support the findings. Cf. *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 441-442.

Even absent the advantage had by the Trial Examiner of seeing and hearing the witnesses, we believe that a comparison of the testimony of the Board's witnesses and those for the Company will substantiate in numerous instances the correctness of the Trial Examiner's rulings on credibility. We are not thereby suggesting that the Trial Examiner's findings were not correct in all instances, but that the veracity or untruthfulness of some witnesses may not be so apparent from reading the printed record. To illustrate the point, we shall analyze the testimony of the captain or the chief engineer on each of five vessels referred to in the opinion below (R. 871) as showing one-sided rulings on credibility. These

officers comprise the most important of the Company witnesses.

1. Captain Gerlach testified that he knew nothing about the Union or its program (R. 307-308, 326). But he admitted he was able to advise Seaman Zmrazek that unions were not being properly led, and that the rotary hiring system, which was a major point in the Union's program, would be disadvantageous to him (R. 307, 313). The captain also stated that he had never seen or read the "Ferber letters" (R. 57, 743-746) or received any information or instructions from the Company concerning the election (R. 327-328), and that he learned that an election would be held on his ship only by hearing other people talk about it (R. 327-328). This testimony may be compared with that of the Company's chief mail clerk (R. 656) that the letters were sent to all ships' masters for distribution to the crew (R. 657, 661, 793, 797), and that of the Company's Manager of Industrial Relations (R. 664) that at the annual spring meeting of the captains and chief engineers they were advised by the President of the Company as to its policy concerning the Union and the coming election (R. 667-669). Again, Captain Gerlach, in testifying about the incident wherein he had ejected Weissflog from the mess-room for attempting to organize the employees, at first insisted that the waitress who

complained to him had merely said Weissflog was annoying the galley crew (R. 310, 322-323), but on further examination by the Trial Examiner he finally admitted that the girl had told him Weissflog was soliciting membership for the Union (R. 325). The captain's attempts to evade answering the questions asked by Board counsel and the Trial Examiner until Company counsel advised him to do so are particularly evident on this issue (R. 324-325).

2. The defects in Captain Murray's testimony are equally apparent (R. 822, 834, n. 39; 673-695). Thus, the captain testified that he had once called upon Shartle to take the wheel and found him to be incompetent (R. 674-675). However, Third Mate Hower, a Company witness, who was present at the time, testified that Shartle had properly handled the wheel, although steering the ship was not a part of Shartle's regular duties (R. 540). Similarly, the captain stated that Shartle was not permitted to handle the winch controls after the incident wherein he permitted the cables to become too taut (R. 685-686), but the third mate appearing as a Company witness testified that Shartle did operate the winches after that date (R. 533-534), which testimony is corroborated by that of another Company witness, Second Mate Chrobak (R. 350). Captain Murray also stated that there was no shortage of A. B.'s, and that he could obtain

as many as he needed (R. 684), a statement that was contradicted by the Company's industrial relations manager (R. 671-672), and by his own mates (R. 338-339, 507-508, 519-520).

3. Captain Brinker was another Company witness whose testimony contains many contradictions (R. 807-811; 416-436). For example, compare his anger at seaman Lee for allegedly driving two firemen off the ship when "it was very difficult to obtain men in 1944" (R. 417-418), with his indifference at the quitting of seaman Conn since "I didn't go short [of men] so very much last year". (R. 432). Captain Brinker also insisted that his conversations with Lee were always held in private (R. 422) and that the crew did not know what they were talking about (R. 430-431), statements that were contradicted by the testimony of Third Mate King, who appeared as a Company witness (R. 437-438), that the crew knew and discussed the fact that Lee and the captain spoke about the Union (R. 444-446).

4. The failure of Captain Lawless to remember his own prior discussions also justified the Trial Examiner's refusal to credit his testimony (R. 814-815; 465-498). Thus, the captain denied that he had ever discussed "rotary shipping" or other points of the Union's program in a meeting he had held with the mates shortly before the election (R. 485-486), although Third Mate Carr, a Company witness (R. 356), who was admittedly present at the meeting, testified that the captain

did discuss the Union's program including "rotary shipping" (R. 375-376, 485). Similarly, the captain denied that he had even heard any gossip about conversations relating to the Union carried on between Third Mate Carr and Third Assistant Engineer Scharmin (R. 356), in the presence of the crew (R. 472-473, 491), whereas the third mate appearing as a Company witness testified that the discussions had been openly held and "Everybody in the boat knew about it" (R. 363).

5. Chief Engineer Hunger is another Company witness whose testimony in many respects was vague and self-contradictory (R. 817-818; 628-648). Thus, Chief Engineer Hunger testified that although he was present during the entire meeting held by the Company for captains and chief engineers in March 1944, he did not hear any discussion of the Union or the forthcoming election (R. 631-632, 646). However, the record clearly indicates that both subjects were discussed at length by the Company's officers (R. 549, 665-666). The chief engineer also testified that when he ordered seaman Babin out of the engine room he also warned him not to bother the men in their rooms because it was interfering with their sleep (R. 629-630). However, on cross-examination he admitted that he did not know Babin was talking to the men in their rooms until a week later, when one of the engine crew complained about it (R. 638-640), and he was therefore unable to explain why he had warned Babin

against such practice before he himself knew about it (R. 639-640). Chief Engineer Hunger also insisted he did not know Babin was a Union organizer when he ordered him out of the engine room (R. 638), but that statement does not agree with his fear that Babin was "trying to talk [one of the engine crew] into something" (obviously membership in the Union) and his testimony that he saw literature in Babin's pocket and "thought it was something pertaining to the _____" (R. 637-638).

Furthermore, an analysis of the record reveals a startling similarity in the tactics used by the Company's supervisors on each of the seven ships involved herein. With but one exception every ship's captain engaged in discussions with the crew members concerning the Union and its program. Each captain found occasion to point up the effect of the Union's anti-discrimination program and its policy of "rotary hiring" in an effort to convince the crew members that it would be to their disadvantage if the Union won the election.²⁴ In addition, each master went out of his way to disparage the Union and its

²⁴ See the testimony relating to (1) Captain Brinker of the *Filbert* (R. 127-133, 136-138); (2) Captain Wallace of the *Johnson* (R. 250-251, 280); (3) Captain Penzenhagen of the *McGonagle* (R. 225, 235, 238); (4) Captain Lawless of the *Bunson* (R. 85); (5) Captain Gerlach of the *Morse* (R. 42-43); and Captain Murray of the *Olds* (R. 171, 215). Captain Lehne of the *Widener* used other tactics to prevent Union organization on his ship (R. 14-15, 28-30).

officers and organizers, utilizing such well known anti-union exclamations as "communists", "Jews", "racketeers", "drunks", and "liars" (R. 42, 58, 84, 85, 130-131, 235). Of course the other ships' officers aped their captains and carried on in the same vein (R. 58, 64, 86, 262, 281-282). Considering, however, this similarity of approach toward the Union's organizing attempts, it is not unreasonable to infer, as the Board did (R. 827), that "their occurrence on every ship about which testimony was adduced disclose both a pattern and a design." And this predetermined pattern, found by the Board, must obviously trace back to the policy of the Company to prevent the organization of its employees.

Upon that assumption we believe that it is only necessary to show, as we have, *supra*, pp. 88-92, that four out of the seven captains involved and of the five who testified,²⁵ were discredited by the conflicts in their own testimony, or by conflicts between their testimony and that of other Company witnesses, to justify the conclusion that the other witnesses for the Company who testified in like vein were also not to be believed. Therefore, although the lack of veracity of such other witnesses may not be so apparent from reading the paper record, the similarity of the statements charged to them and the similarity of

²⁵ It must be remembered that neither Captain Wallace nor Captain Penzenhagen were called by the Company to refute the testimony of the Board's witnesses.

their denials to those of the witnesses whom we have shown to be patently untruthful, would have warranted the Trial Examiner, even apart from his observations during the hearing, to conclude as he did that little credence could be given to their testimony on such issues.

The incidents described above, *supra*, pp. 88-92, show why we believe the Trial Examiner properly discredited the Company's witnesses in most of the instances in question. In addition, a reading of the entire testimony of the witnesses discussed above will show their vagueness as to detail and their reluctance to commit themselves to anything more than generalities, except in denying specific statements quoted to them by Company counsel.

The fact that this may not appear from the cold record as to some of the witnesses does not prove the bias of the Trial Examiner. It merely suggests what most judges know, that it is difficult for anyone who has not heard the witnesses to determine matters of credibility on the basis of a printed record.

The court below was thus clearly in error in holding that the record shows the Trial Examiner to have been guilty of pre-determination of the issues, that he had approached the case with a closed-mind, or that he was biased and prejudiced in any way. The record amply demonstrates that

the Trial Examiner, in his resolutions of the conflicting testimony, fairly and impartially considered the evidence presented by both Sides, and that both his conduct and his rulings comported with the highest judicial standards.

III

THE BOARD'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, AND ITS ORDER IS VALID AND PROPER

A. THE BOARD'S FINDINGS ARE ADEQUATELY SUPPORTED BY SUBSTANTIAL EVIDENCE EVEN WITHOUT REGARD FOR EVIDENCE WHICH WAS DENIED OR CONTRADICTED

Section 10 (e) of the Act grants the Courts of Appeals the authority to enforce the Board's orders, provided that "the Board's findings are supported by evidence and the order is in accordance with law." *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 161 F. 2d 798, 800 (C. C. A. 5). Nowhere in its decision did the court below indicate that the findings were not supported by substantial evidence. Since the court below stated that it had given "careful consideration of the record" (R. 871), and has agreed that "the findings of the Board are binding upon us if based upon evidence" (R. 872), we may assume that the court failed to detect any findings of the Trial Examiner and the Board which were not supported by evidence.

In any event, we think it plain that there is sufficient evidence in the record to support the Board's findings, and that the Board's order is appropriately designed to remedy the unfair labor practices found. The supporting evidence is summarized adequately in the Statement, *supra*, pp. 4-28. In this Point we shall show that even if we were to eliminate all the testimony of the Board's witnesses which was specifically denied or contradicted, there is enough undisputed and admitted evidence in the record to support the Board's findings of interference, restraint and coercion.

The Company offered no evidence to contradict the testimony of seaman Anderson that Captain Wallace of the *Johnson* had questioned him as to his Union membership (R. 812; 250); whether other employees on the ship were Union members (R. 812-813; 251, 253); whether he was "an organizer or just a good Union man" (R. 812; 252); and whether two other seamen were Union members and had visited the union hall (R. 813; 253-254). Seaman Sims of the same ship, whose testimony was also undenied, stated that Captain Wallace had threatened to discharge Anderson at the first opportune moment because of his Union activity, although he was admittedly a good wheelsman (R. 811-812; 280). Nor did the Company call as a witness Captain Penzenhagen of the *McGonagle*, although seaman Jones had testi-

fied that the Captain had similarly questioned him as to his Union membership (R. 813; 225). And Captain Lawless of the *Bunson*, who did testify, did not deny that while in the pilot house of the ship he had asked seaman Vogt whether he belonged to the Union (R. 814; 84).

Similarly, seaman Lee of the *Filbert*, a known Union organizer, testified that he had been told by Chief Engineer Curry that his discharge had been suggested to Captain Brinker by John Zyp, who is in charge of the Company's employment office (R. 134-135, 343, 670). The recommendation was not put into effect because of the chief engineer's threat that if Lee were discharged, he too would leave the ship (R. 810-811; 135). This evidence was not disputed, although Captain Brinker denied other phases of Lee's testimony, and Mr. Zyp and Chief Engineer Curry, although available, were not called as witnesses (R. 811; 416-436). The Board found that the threat to discharge Lee was based upon his activity as a known Union organizer, since in all other respects he was considered a competent employee (R. 811; 135).

Such interrogation of employees as to their Union membership and organizing activities, and threats to discharge employees because of such activity have long been held to be unfair labor

practices within the meaning of Section 8 (1) of the Act.²⁶

Also completely uncontradicted is the testimony of Union organizer Babin that First Mate Eckstrom (R. 13) of the *Widener* repeatedly subjected him to abusive and discriminatory treatment because of his known Union activities (R. 818; 15-17), thereby belittling him in the eyes of the crew and impeding his organizational efforts; the testimony of seaman Sims that Captain Wallace of the *Johnson* had threatened that if the Union won the election the Company would cancel the annual bonus given to the employees at the end of each sailing season (R. 811; 280); the statement charged to Captain Wallace by Sims that "I don't want any part of [the Union] on my ship" (R. 811; 280); or the threat implied in the statement by First Assistant Engineer Anderson to Sims and other crew members that "The CIO isn't going to last always, * * * the God-damned Jews are going to be out and we will have a different set up" (R. 812; 282).

Although there is some dispute as to the language used, and the motive behind it, there is no real conflict in the evidence as to the fact that company

²⁶ *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 518; *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, 471, 477-478; *National Labor Relations Board v. Fruehauf Trailer Co.*, 304 U. S. 49, 55; *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270.

officers had restricted the movement of Union organizers and unduly limited their freedom of discussion, despite the fact that there was no rule against the employees holding conversations on any subject even during working hours (R. 824-826; 318, 403). Thus, Captain Brinker of the *Filbert* corroborated seaman Lee's testimony that he had ordered him not to continue to solicit crew members to join the Union if they had once refused (R. 825; 418). Captain Gerlach of the *Morse* admitted that he had warned Union organizer Weissflog not to speak to the other seamen (R. 317-18), had actually physically ejected him from the room occupied by the oilers because, as he told Mate Zyp, "he was organizing the oilers at night," (R. 329-330, 604) and ordered him from the mess hall during a meal period for the same reason (R. 322-325). Chief Engineer Hunger of the *Widener* also admitted that he had driven seaman Babin out of the engine room, and ordered him to stay away from the quarters occupied by the engine crew because "I figured he was trying to talk him [one of the oilers] into something" (R. 629, 637).

We believe that it is unnecessary to discuss here the other evidence,²⁷ a great deal of it also undisputed, or only partially disputed, which is set forth in detail in the Trial Examiner's intermedi-

²⁷ The evidence is discussed at length in the Statement, *supra*, pp. 4-28.

ate report (R. 801-839), and upon which the Board based its findings of violation of Section 8 (1) and (3) of the Act (R. 855). Since the resolution of issues of credibility is solely within the province of the Board,²⁸ we submit that upon both the controverted testimony as resolved by the Trial Examiner, and the undisputed evidence, the Board's findings are amply supported by the record.

In brief, the evidence shows that the Company's supervisory officers engaged in various forms of unfair labor practices which have been condemned by the Board and the courts. The close surveillance and criticism of the work of ship organizers in order to discourage membership in the Union (*supra*, pp. 6-10); the interrogation of employees concerning their union membership and activity (*supra*, pp. 10-11); the threats that if the employees select the Union as their bargaining representative they will suffer financial detriment (*supra*, p. 98); the imposition solely upon union leaders of restrictions on visiting and talking with other crew members (*supra*, pp. 6-9); the attempt to discharge Vogel and the threats to discharge Anderson and Lee because of their organizing activity (*supra*, pp. 11-13); and the discriminatory discharge of Shartle for the same reason (*supra*, pp. 13-22)

²⁸ *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105; *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 596-597; *National Labor Relations Board v. Waterman S. S. Corp.*, 309 U. S. 206, 226.

have too long been recognized as violative of the provisions of Section 8 (1) and (3) of the Act to require citation of authority. These findings, many of them based upon undisputed evidence, clearly justified the Board in concluding that the Company had thereby committed unfair labor practices and are more than sufficient to sustain the Board's order.

B. THE BOARD'S ORDER IS VALID AND PROPER

Upon the unfair labor practices found the Board ordered the Company, (1) to cease and desist from further engaging in such practices, or in any other manner interfering with the organizational rights of its employees guaranteed by Section 7 of the Act; (2) to offer reinstatement and make whole Howard Shartle, the employee who had been discriminatorily discharged; and (3) to post appropriate notices of its compliance with the order on each of its vessels (R. 856-857).

The order is in the usual and customary form designed to remedy violations of Section 8 (1) and (3) of the Act.²⁹ *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265; *May Department Stores Co. v. National Labor Relations Board*, 326 U. S. 376, 390-391; *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426, 436-438;

²⁹ Section 8 (1) and (3) of the original Act was renumbered 8 (a) (1) and (3) in the amended Act (p. 110, *infra*). However, the amendments made no change in the language of this section material to the issues in the instant case.

H. J. Heinz Co. v. National Labor Relations Board, 311 U. S. 514, 520-521; *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348.

The only criticism levied by the Company at the Board's order involved the requirement that notices of compliance be posted on all the Company's vessels (R. 856-857), although unfair labor practices were found to have occurred on only seven out of seventy-two ships. Although the Trial Examiner had recommended this posting provision (R. 841), and the Board had adopted it without change (R. 856-857), the Company raised the propriety of the provision for the first time in its brief to the court below. We submit that Section 10 (e) of the Act, *infra*, p. 108, precludes the consideration of this question by the courts, since it had not been raised before the Board. *Marshall Field & Co. v. National Labor Relations Board*, 318 U. S. 253, 255; *National Labor Relations Board v. Cheney California Lumber Co.*, 327 U. S. 385, 387-389.

Furthermore, since the evidence shows (R. 801; 138, 241-242, 325-326, 343) and the Board found (R. 801) that employees transfer to different ships each season, and that most of the employees on the *Olds*, where Shartle was discharged, thereafter scattered to various ships (R. 801, n. 1; 343), only by posting on all the ships can the employees di-

rectly affected be reached.³⁰ Orders containing similar posting provisions have been enforced by the courts in previous cases involving steamship companies. *National Labor Relations Board v. Waterman S. S. Corp.*, 309 U. S. 206, 226, directing enforcement in full of 7 N. L. R. B. 237, 253; *National Labor Relations Board v. Isthmian S. S. Co.*, 126 F. 2d 598, 601 (C. C. A. 2), enforcing 22 N. L. R. B. 689, 702; *The Texas Co. v. National Labor Relations Board*, 135 F. 2d 562, 563 (C. C. A. 9), enforcing 42 N. L. R. B. 593, 609.

IV

THE BOARD'S ORDER SHOULD BE ENFORCED BY THIS COURT

As we have shown, the Board's findings are supported by substantial evidence, *supra*, pp. 95-101, and its order is in all respects valid and proper, *supra*, pp. 101-103. The Trial Examiner's resolution of the issues of credibility were not based upon bias or prejudice, but are amply supported by the record, and the Board's adoption of such findings did not constitute prejudicial error. See *supra*, pp. 70-95. The court below erred therefore in refusing to enforce the Board's order.

The unfair labor practices here complained of were committed in 1944 and 1945, and the case

³⁰ This is confirmed by the testimony of the Company's own witnesses; they repeatedly advised the seamen that if the Union won the election and instituted its "rotary shipping" policy the men would not be able to change ships whenever they desired (R. 43, 57, 161, 241, 250, 280, 745).

itself has now been pending for more than three years. Although the court below did not indicate whether, absent the alleged bias, it believed that there was substantial evidence to support the Board's findings, we believe that this Court should determine that question and finally adjudicate the issues involved. "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require." *Watts, Watts & Co. v. Unione Austriaca Etc.*, 248 U. S. 9, 21. And this Court has, in other Labor Board cases, passed upon the substantiality of the supporting evidence even though the Court of Appeals had not done so. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 29, reversing, 83 F. 2d 998 (C. C. A. 5); *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U. S. 49, 57, reversing 85 F. 2d 391 (C. C. A. 6); *National Labor Relations Board v. Friedman-Harry Marks Co.*, 301 U. S. 58, 75, reversing 85 F. 2d 1 (C. C. A. 2). To avoid further delay, we respectfully request that, in addition to reversing the court below on the due process issues presented, this Court pass on the sufficiency of the evidence and direct that the Board's order be enforced in full.

For all of the reasons set forth in this brief, we believe that the Trial Examiner acted properly and that the Board's order should have been

enforced. However, even if it be assumed that the court below was correct in finding the Trial Examiner biased and prejudiced, it should not have denied enforcement of the Board's order without remanding the case to the Board with leave to make its own appraisal of the credibility of the witnesses and its own findings, uninfluenced by those of the Trial Examiner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be reversed and the cause remanded with directions to enforce the Board's order in full.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT L. STERN,
*Special Assistant
to the Attorney General.*

ROBERT N. DENHAM,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

RUTH WEYAND,
Assistant General Counsel,

HARVEY B. DIAMOND,
*Attorney,
National Labor Relations Board.*

JANUARY, 1949.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * *. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district,

respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its

member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon

which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (c), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

* * * * *

2. The relevant provisions of the Labor Management-Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. I, 141, *et seq.*) are as follows:

* * * * *

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 8 (a). It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed,

graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

"SEC. 10 (c). * * *. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."